

# FIRST NATIONS REPRESENTATION ON ONTARIO JURIES

Report of the Independent  
Review Conducted by  
The Honourable Frank Iacobucci

February 2013

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THIS REPORT IS DEDICATED  
TO THE MEN, WOMEN, AND CHILDREN  
OF FIRST NATIONS IN ONTARIO WHOSE  
PERSEVERANCE AND COURAGE IN THE  
FACE OF ADVERSITY AND CHALLENGES  
CONTINUE TO BE AN INSPIRATION.



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# PART I

## INTRODUCTION





## A. PREFACE AND ACKNOWLEDGEMENTS

1. THIS REPORT DEALS WITH ONE OF THE MOST VENERABLE INSTITUTIONS IN HISTORY, THE JURY. MORE SPECIFICALLY IT DEALS WITH THE LACK OF REPRESENTATION OF FIRST NATIONS PEOPLES LIVING IN RESERVE COMMUNITIES ON JURIES IN ONTARIO.

2. As with most issues involving First Nations peoples, it is difficult to deal with one issue in a discrete manner without dealing with the influences of many other factors that impact on the specific issue in question. So it is with representation of First Nations peoples on Ontario juries. What appears at first blush to be a narrow assignment simply on jury representation as set forth in the Order-in-Council, triggers considerations and ramifications from numerous other factors that affect the principal question of my mandate as an Independent Reviewer of the subject. Why that broader inquiry into these important factors is necessary will be dealt with in this Report.

3. However, it should be stated at the outset that, although the Independent Review is not authorized by the Order-in-Council to be a detailed examination of, and recommendations for the reform of, the justice system of the province or for improvements in social and economic programs for First Nations, these matters not only lurk in the background but are also of great relevance. In short, to ignore this background is to jeopardize the chances of making any real progress on the issue of representation of First Nations peoples on juries.

4. As this Report will demonstrate, there is not only the problem of a lack of representation of First Nations peoples on juries that is of serious proportions, but it is also regrettably the fact that the justice system generally as applied to First Nations peoples, particularly in the North, is quite frankly in a crisis. If we continue the *status quo* we will aggravate what is already a serious situation, and any hope of true reconciliation between First Nations and Ontarians generally will vanish. Put more directly, the time for talk is over, what is desperately needed is action.

5. Doing nothing will be a profound shame especially when there has been a greater recognition throughout Canada of the tragic history of Aboriginal people, with many examples of mistreatment, lack of respect, unsound policies, and most importantly a lack of mutual trust between Aboriginal and Non-Aboriginal people. Indeed the setting up of this Independent Review is an example of the recognition of importance of that history by the Government of Ontario and I commend them for that.

6. But if this Report and its recommendations together with their implementation are put on the shelf, we as a society will all be the worse off and the momentum for progress will likely come to a halt. The consequences of this will be very serious.

7. This Independent Review and Report were largely made possible through the efforts of First Nations people, including Chiefs, Councillors, Elders, reserve residents, provincial territorial organizations and their leaders, and even some First Nations students. To all of them I express my sincere gratitude and appreciation for their involvement, sharing their experiences, offering opinions and suggestions, and for extending hospitality and courtesy to my colleagues and me. I cannot name you all, but I can say I am indebted to all of you for your help and commitment in the work of the Review.

8. I also wish to record my gratitude to specific groups and individuals for their invaluable help. These include Nishnawabe Aski Nation (former Deputy Grand Chief Terry Waboose and former Grand Chief Bentley Cheechoo), their counsel Julian Falconer, Julian Roy, Meaghan Daniel, all of whom played a central role in the launching of the Independent Review and organizing visits to reserves in the North which were most important in obtaining the views of First Nations members in different contexts and with different experiences. Also, I would like to thank the Union of Ontario Indians and their counsel Austin Acton, the Chiefs of Ontario, Aboriginal Legal Services of Toronto and their counsel Christa Big Canoe and Jonathan Rudin. My thanks also go to then Grand Chief Diane Kelly and her colleagues on the Treaty 3 Council of Chiefs. Thanks are also due to Irwin Elman, the Provincial Advocate for Children and

Youth. I would also like to thank Marlene Pierre, Sharon Smoke, Chris Moonias and Bruce Moonias, all of whom are family members of First Nation victims whose deaths were subject to a coroner's inquest, for sharing their grief with us and their submissions on coroners inquests and related matters.

9. We received considerable help and cooperation from officials at the Ministry of the Attorney General, Ontario Court Services, the Provincial Jury Centre, and judges of the Superior Court and Ontario Court of Justice and their officials. We have had the benefit of a paper describing experiences of jury role processes in other jurisdictions, prepared by former Attorney General Michael J. Bryant, who currently works as a consultant on Aboriginal issues.

10. For special recognition, I would like to acknowledge the former Attorney General Chris Bentley and current Attorney General John Gerretsen for their cooperation and support. I should also wish to thank especially Murray Segal, the former Deputy Attorney General of Ontario, for his instrumental role in setting up the Independent Review and collaborative effort to support the Review in every way. Thanks are also due to Acting Deputy Attorney General Mark Leach for his cooperation and help.

11. Finally, I should like to thank my team: John Terry, Counsel to the Independent Review, and Candice Metallic, Associate Counsel to the Review. No one could have better or more talented colleagues with whom to work than those two. They played an immensely important role in all phases of the Review and I thank them profoundly. I would also like to thank Nick Kennedy and Ryan Lax, who greatly helped us in the finalization of the Report.

12. Much time, effort and commitment has gone into the preparation of this Report by all those I have mentioned. I believe I express the sentiment of all concerned that improvements to the jury representation of First Nations peoples will be significantly advanced as a result of our collective efforts.

13. We also share a dream that the jury representation changes will spawn other needed improvements to the justice system and to the relationship between Ontario and First Nations peoples.

## B. INTRODUCTION AND EXECUTIVE SUMMARY

### 1. INTRODUCTION

14. This Report will, I hope, be a wake-up call to all who are concerned with the administration of justice in Ontario. As I stated in the Preface above, it has become clear to me in carrying out this Independent Review that the justice system, as it relates to First Nations peoples, and particularly in Northern Ontario, is in crisis. Overrepresented in the prison population, First Nations peoples are significantly underrepresented, not just on juries, but among all those who work in the administration of justice in this province, whether as court officials, prosecutors, defence counsel, or judges. This issue is made more acute by the fact that Aboriginal peoples constitute the fastest-growing group within our population, with a median age that is significantly lower than the median age of the rest of the population.

15. The problem that is the specific focus of this Report – the underrepresentation of individuals living on reserves on Ontario's jury roll – is a symptom of this crisis. It is that narrow problem, and the concerns it raises about the fairness of our jury system, that have rightly prompted the Government of Ontario to arrange for this Independent Review to be carried out. But an examination of that problem leads inexorably to a set of broader and systemic issues that are at the heart of the current dysfunctional relationship between Ontario's justice system and Aboriginal peoples in this province. It is these broad problems that must be tackled if we are to make any significant progress in dealing with the underrepresentation of First Nations individuals on juries. And it is this systemic approach to the issues which has guided me in the conduct of my review and the formulation of my recommendations, as discussed below.



## 2. MY MANDATE AND WORK

16. I was appointed to carry out this Independent Review by Order-In-Council 1388/2011, dated August 11, 2011. The Order-in-Council, a copy of which is attached as Appendix A to this Report, directed me to make recommendations:

- (a) to ensure and enhance the representation of First Nations persons living on reserve communities on the jury roll; and
- (b) to strengthen the understanding, cooperation and relationship between the Ministry of the Attorney General and First Nations on this issue.

17. I commenced my work in Fall 2011 after assembling a small legal team to assist me. We began the Review by developing a process to gather information from all of those who have been involved in, or are affected by, the juries system in Ontario as it relates to the representation of First Nations peoples on the jury roll. After creating a website for the Independent Review, we set out to develop a process that would allow us to meet and receive submissions from interested First Nations leaders, communities and organizations, officials of the Ministry of Attorney General, Ministry of Health and Long-Term Care, the Provincial Advocate for Children and Youth, other service organizations and members of the judiciary who have presided over cases or motions relating to the issues under review.

18. Hearing from the First Nations leadership, people, and organizations as the first order of business was the best way, in my view, for me to understand and accurately define the systemic issues affecting First Nations peoples living in reserve communities as it relates to jury service. Given the vast diversity of First Nations and Treaty groups and organizations in the Province of Ontario, we determined that the engagement process must begin by introducing the Independent Review to First Nations and inviting them to participate in a manner they deemed appropriate. Accordingly, in November 2011, I sent a letter to all First Nations governments and First Nations and Treaty organizations in Ontario offering to meet with them, receive written submissions, or accommodate a combination of both. A copy of this correspondence is attached as Appendix D to this Report.

19. Between November 2011 and May 2012, I met with the leadership and people from 32 First Nations, mostly within their communities, and four First Nation organizations. This engagement included meetings with First Nations that are members of the Nishnawbe Aski Nation, the Union of Ontario Indians, Grand Council Treaty #3, as well as four First Nations that are unaffiliated with a tribal council or First Nations organization. The list of First Nations that I visited during this phase of the Review is attached as Appendix E to my Report. We also met with representatives of Aboriginal Legal Services of Toronto, who convened a Families Forum at which my team and I met with some family members of First Nations victims whose deaths were subject to a coroner's inquest. Overall, the cumulative meetings and discussions with every person involved helped shape my understanding of the systemic and procedural issues impacting the representation of First Nations peoples on the jury roll in Ontario.

20. Following the First Nations engagement process, I prepared a progress report and a discussion paper, attached as Appendix F to this Report, that I sent to all First Nations in Ontario, First Nation and Treaty organizations, and interested Aboriginal service providers, seeking their further input. The discussion paper set out the issues identified by First Nations during the engagement process and posed questions to solicit feedback on ways to address the challenges associated with the representation of First Nations peoples on juries.

21. Once I became familiar with the issues from the First Nations perspective, we met and had discussions with officials from the Ministry of the Attorney General, including the Court Services Division and the Provincial Jury Centre. We also met with some members of the judiciary who have presided over many cases involving First Nations offenders. Considering the large demographic of First Nations youth in Ontario, we also thought it useful to meet with the Provincial Advocate of Children and Youth in Ontario.

22. We received many written submissions as a result of the engagement process and the feedback requested through the discussion paper, including from, among others, Nishnawbe Aski Nation, the Union of Ontario Indians, the Chiefs of Ontario, Aboriginal Legal Services of Toronto, the Office of the Provincial Advocate for Children and Youth in Ontario, and Legal Aid Ontario.

23. Following receipt of written submissions in early July 2012, I prepared my Report based on all the information received through meetings and written submissions and further research and analysis carried out by my team and me. The Report was substantially completed by the end of August 2012 and provided to translators in early September 2012 for translation into French, Cree, Ojibway, Oji-Cree and Mohawk.

### 3. ISSUES IDENTIFIED DURING VISITS AND MEETINGS

24. My meetings with First Nations leaders, Elders, people, technicians and service providers from 32 communities during the engagement process played a crucial role in helping me understand the systemic and procedural issues affecting the representation of First Nations peoples on the jury roll in Ontario. During all these meetings, one point was resoundingly clear: substantive and systemic changes to the criminal justice system are necessary conditions for the participation of First Nations peoples on juries in Ontario.

25. Aside from the issues regarding the most effective manner to obtain names of First Nations reserve residents for the purposes of the jury roll, the fact is that many First Nations people are plainly reluctant to participate in the jury system. Many reasons exist for that reticence, and I heard them repeatedly throughout the engagement process.

26. First, First Nations leaders and people spoke about the conflict that exists between First Nations' cultural values, laws, and ideologies regarding traditional approaches to conflict resolution, and the values and laws that underpin the Canadian justice system. The objective of the traditional First Nations' approach to justice is to re-attain harmony, balance, and healing with respect to a particular offence, rather than seeking retribution and punishment. First Nations people observe the Canadian justice system as devoid of any reflection of their core principles or values, and view it as a foreign system that has been imposed upon them without their consent.

27. Second, First Nations people often spoke of the systemic discrimination that either they or their families have experienced within the justice system in relation to criminal justice or child welfare. These experiences with the criminal justice system, along with historic limitations on the rights of First Nations people, have created negative perspectives and an inter-generational mistrust of the criminal justice system. Such perceptions, by implication, extend to participation in the jury process. First Nations people generally view the criminal justice system as working against them, rather than for them. It is an affront to them to participate in the delivery of this system of justice.

28. Third, First Nations people lack knowledge and awareness of the justice system generally, and the jury system in particular. It was understandably expressed that most First Nations individuals will refrain from participating in a process they know nothing about. Many First Nations people were unaware that the same jury roll was used to select juries for both trials and coroner's inquests. Therefore, most leaders identified the need for a focused and sustained education strategy for First Nations communities with respect to the role of juries in the justice system and the process by which jury rolls and jury panels are created, as well as the rights of individuals accused of offences and the rights of victims.

29. Fourth, First Nations leaders resoundingly and assertively expressed the desire to assume more control of community justice matters as an element of what they strongly believe is their inherent right to self-government, and at the very least be involved in developing solutions to the jury representation issue. Having been introduced to community-based restorative justice initiatives in previous years, First Nations experienced the benefits to their communities that came from the development of a culturally-appropriate





approach to justice. However, these programs were discontinued owing to funding cuts and will require financial resources and capacity to be resumed. First Nations leaders were unequivocal that re-introducing restorative justice programs would have multiple benefits at the community level. Such benefits include the delivery of justice in a culturally relevant manner, greater understanding of justice at the community level, increased community involvement in the implementation of justice and, finally, an opportunity to educate people about the justice system and their responsibility to become engaged on the juries when called upon to do so.

30. Fifth, the issue of local police services arose in many discussions throughout the engagement process. It became very clear that inadequate police services and associated funding contribute to negative perceptions of the criminal justice system. Many First Nations were very concerned about the limited and under-resourced police services and the lack of sufficient training for them. Some First Nations leaders expressed frustration regarding the lack of enforcement of First Nation by-laws.

31. A common theme expressed by First Nations leaders was concern for the protection of the privacy rights of their citizens with respect to the unauthorized disclosure of personal information for the purposes of compiling the jury roll. Confusion with respect to the obligations of First Nations governments in this regard appears to be related to different positions taken by Aboriginal Affairs and Northern Development (formerly Indian and Northern Affairs Canada) since 2001. The difficulty of creating and maintaining a single source list of individual residents that includes dates of birth and addresses on reserve is a real challenge because First Nations governments do not typically possess such a list. As an alternative, many First Nations leaders proposed that jury service ought to be voluntary and expressed a willingness to help facilitate such an approach. First Nations representatives also stated that the process to collect names for the purposes of the jury roll must be clear, tangible and consistent throughout all judicial districts in which First Nations are located.

32. First Nations peoples' willingness to participate in the jury process is also negatively affected by the content of the jury questionnaire. There are a number of features that First Nations people identified as discouraging them from responding. First, the statement of penalty of a fine or imprisonment for non-response within five days is viewed as coercive and inappropriately imposing jury duty through intimidation and threat, and the time frame of five days for response is thought to be unreasonable. Second, the requirement to declare Canadian citizenship prompts many to answer in the negative. However, it was expressed that if there were an option to declare First Nation citizenship or membership, many more First Nations people would respond positively, thereby increasing the number of eligible First Nations jurors. Third, the language requirement for juror eligibility, being English or French, is problematic for First Nations people whose primary language is their indigenous language. It was suggested that broadening the number of languages, along with the provision of translation services, would enhance First Nations responses to jury questionnaires and participation. It was suggested that an exemption be created for First Nations elected leadership, akin to the exemption for federal, provincial and municipal elected officials. Finally, it was explained that First Nations' lack of understanding of the jury selection process and role of juries served as a barrier to responding to jury questionnaires.

33. The engagement process also identified many practical barriers that exist with respect to the participation of First Nations peoples on juries, particularly in northern Ontario. These barriers include: the cost of transportation, where travel arrangements are not pre-arranged by the Court Services Division; inadequate allowances for accommodation and meals; the absence of child and elder care as eligible costs; and lack of income supplements. Further, community-based supports were viewed as a required service to assist with process logistics. Finally, the existence of criminal records and lack of knowledge and access to pardon procedures serves to exclude many potential First Nations jurors.

34. Many First Nations people, specifically those who unfortunately are, or have been, involved in coroner's inquests related to the death of a family member in state care, appreciate the importance of a coroner's jury that is representative of First Nations peoples and were interested in participating in coroner's inquests. They were anxious to see the resolution of this issue so the investigations into the deaths can proceed.

35. First Nations leaders unequivocally asserted that the way forward with respect to enhancing a relationship with the Ministry of the Attorney General in the context of the jury system, and all justice matters, is through a government-to-government relationship and a process that reflects such a relationship. First Nations seek greater control of the justice system as it applies to their people and view the re-integration of restorative justice programs as one measure to achieve this goal. The need for a collaborative approach to develop a proper jury roll process for First Nations peoples on reserve is viewed as a necessary step forward in a respectful relationship. Moreover, partnering with First Nations with respect to educational initiatives aimed at First Nations and government officials would contribute to improving the relationship.

36. Government officials with whom I spoke echoed the need for measures to substantially increase the participation of First Nations reserve residents on juries, in addition to obtaining reliable records required to prepare a representative jury roll. Court officials in the Kenora District, and more recently Thunder Bay, have undertaken various efforts to reach out to First Nations to obtain residence information and have undertaken programs to educate and inform First Nations communities about the jury system. However, we heard a consensus view among government officials that significant improvements are necessary. Using the data held by the Ontario Health Insurance Plan (OHIP) as one source list of names, addresses and dates of birth of reserve residents, coupled with information-sharing agreements or memoranda of understanding to protect the confidentiality of such information, is an approach worthy of further exploration and discussion with First Nations leadership. Moreover, educational efforts similar to the initiative undertaken by the Ministry of Attorney General and the Union of Ontario Indians and the Grand Council of Treaty #3 to conduct Jury Forums in 15 First Nations could be used as an ongoing measure to educate First Nations peoples on the subject of juries. Other creative approaches were suggested to minimize the burden on First Nations, such as the use of video conferencing technology for the jury selection process and Superior Court of Justice sittings in select First Nations communities.

#### 4. WRITTEN SUBMISSIONS

37. In addition to certain written submissions I received during the engagement sessions, I also received helpful and detailed written submissions at the conclusion of the engagement process from six organizations: Nishnawbe Aski Nation, Union of Ontario Indians, Chiefs of Ontario, Aboriginal Legal Services of Toronto, the Office of the Provincial Advocate for Children and Youth, and Legal Aid Ontario. These organizations' submissions were consistent with the views I heard from First Nations people during the engagement process, emphasizing, among other things, the need to address jury roll reform in partnership with First Nations. As the Nishnawbe Aski Nation stated in its submissions, the underrepresentation of First Nations peoples on Ontario juries "is but one symptom of a larger problem of alienation and exclusion of First Nations people within the justice system."

38. The submissions offered many recommendations on ways in which the systemic and procedural issues related to the jury roll could be addressed. The matters addressed in the recommendations included, among other things: enhancement of community or restorative justice programs; improvements to the operation of the justice system in northern Ontario; uniform coordination and implementation of section 6(8) of the *Juries Act*; the involvement of First Nations peoples in compiling the jury roll; increased language supports with respect to juror questionnaires and translation services; increased juror remuneration and expense allocations; the recruitment of First Nations liaisons; revising the juror questionnaires; meaningful educational, outreach and training initiatives, especially for youth; measures to address inadequate police services in order to increase confidence in the justice system; and the need to take prompt and assertive steps to improve the relationship between First Nations and the Attorney General.

39. I am grateful for the thought and effort that these organizations demonstrated in providing me with these very comprehensive submissions and recommendations.

## 5. HISTORICAL, LEGAL AND COMPARATIVE RESEARCH

40. In addition to the engagement process and submissions described above, my team and I carried out research respecting various issues, including the history of juries and jury selection in Ontario, the requirement that a jury be representative, and the history and practice with respect to the representation of First Nations peoples on Ontario juries. Juries have served for generations as the cornerstone of our justice system, as well as a fundamental institution in the administration of justice in civilizations dating back to ancient times. Unfortunately, however, the jury system as it has developed and operated in Ontario, like Ontario's justice system in general, has not often been a friend to Aboriginal persons in Ontario. Indeed, criminal jury trials in Canada were used at times as a tool to punish what the British viewed as disloyal behavior on the part of Aboriginal people, and to persecute the customary practices of First Nations on the grounds that they constituted criminal behaviour.

41. Our research focused in particular on the application of, and case law respecting, the requirement in section 6(8) of the *Juries Act* for the sherriff "to obtain the names of inhabitants of the reserve from any record available."<sup>1</sup> It is clear to me as a result of this research and in particular the materials filed in conjunction with recent court cases respecting this matter that the current reliance by Court Services officials on obtaining the names from Band List information, though resulting from well-meaning efforts, is ad hoc and leads in many cases to out-of-date and otherwise unreliable information being used to compile the jury roll.

42. In accordance with paragraph 4 of the Order-in-Council, I also considered the law and practice in other jurisdictions to assess what lessons we can learn from them. Underrepresentation of Aboriginal peoples on juries is by no means exclusively an Ontarian or Canadian issue. Rather, this issue exists in various jurisdictions that rely on juries and that have sizeable Aboriginal populations, including other Canadian provinces, New Zealand, Australia and the United States. In reviewing law and practice in other jurisdictions, I had the benefit of a paper describing experiences of jury role processes in other jurisdictions prepared by former Attorney General Michael J. Bryant, who currently works as a consultant on Aboriginal issues.

43. I found this review of experience in other jurisdictions to be very helpful. It showed, among other things, that many other Canadian provincial governments rely on health insurance records as a source for compiling the jury roll. The review also revealed a number of practices in other jurisdictions that I have recommended be considered or studied for potential use in Ontario, including allowing individuals to volunteer for jury service as a supplemental source list (as is allowed in New York State), holding court hearings in remote communities, and drawing jurors from residents living reasonably close to where the hearing is held (as is done in the Northwest Territories and Alaska), and, when a jury summons or questionnaire is undeliverable or is not returned, sending another summons or questionnaire to a resident of the same postal code, thereby ensuring that nonresponsive prospective jurors do not undermine jury representativeness (an approach adopted in some U.S. states to respond to underrepresentation of minorities on juries).

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<sup>1</sup> *Juries Act*, R.S.O. 1990, c. J. 3, s. 6(8).

## 6. RECOMMENDATIONS

44. As a result of the engagement process, review of submissions, and research and analysis as described above, I make the following 17 major recommendations.

**RECOMMENDATION 1:** the Ministry of the Attorney General establish an Implementation Committee consisting of a substantial First Nations membership along with Government officials and individuals who could, because of their background or expertise, contribute significantly to the work of the Implementation Committee. This Committee would be responsible for the oversight of the implementation of the below recommendations and related matters. In view of the importance and urgency of the matter, I recommend that the Committee be established as soon as practically possible.

**RECOMMENDATION 2:** the Attorney General establish an Advisory Group to the Attorney General on matters affecting First Nations and the Justice System.

**RECOMMENDATION 3:** after obtaining the input of the Implementation Committee, the Ministry of the Attorney General provide cultural training for all government officials working in the justice system who have contact with First Nations peoples, including police, court workers, Crown prosecutors, prison guards and other related agencies.

**RECOMMENDATION 4:** the Ministry of the Attorney General carry out the following studies for eventual input by the Implementation Committee:

- (a) a study on legal representation that would involve Legal Aid Ontario, particularly in the north, that would cover a variety of topics, including the adequacy of existing legal representation, the location and schedule of court sittings, and related matters.
- (b) a study on First Nations policing issues, including the recognition of First Nations police forces through enabling legislation, the establishment of a regulatory body to oversee the operation of First Nations law enforcement programs, the creation of an independent review board to adjudicate policing complaints, and the development of mandatory cultural competency training for OPP officers; and
- (c) a review of the Aboriginal Court Worker program and an examination of resources required to improve the program.

**RECOMMENDATION 5:** the Ministry of the Attorney General create an Assistant Deputy Attorney General (ADAG) position responsible for Aboriginal issues, including the implementation of this Report.

**RECOMMENDATION 6:** after obtaining the input of the Implementation Committee, the Ministry of the Attorney General provide broader and more comprehensive justice education programs for First Nations individuals, including:

- (a) developing brochures in First Nations languages with plain wording which provide comprehensive information on the justice system, including information respecting the role played by criminal, civil, and coroner's juries;
- (b) establishing First Nations liaison officers responsible for consulting with First Nations reserves on juries and on justice issues;
- (c) commissioning the creation of video or other educational instruments, particularly in First Nations languages, that would be used to educate First Nations individuals as to the role played by the jury in the justice system and the importance of participating on the jury; and



- (d) considering the feasibility of a program that would enlist students from Ontario law schools to participate in intensive summer education and legal assistance programs for First Nations representatives, dealing with the justice system generally and the jury system in particular, in consultation with Chiefs, and Court Services officials.

**RECOMMENDATION 7:** with respect to First Nations youth, in addition to having a youth member on the Implementation Committee, the Implementation Committee should request that the Provincial Advocate for Children and Youth facilitate a conference of representative youth members from First Nations reserves to focus on specific issues in the relationship between youth, juries, and the justice system, addressed in this report. The Provincial Advocate for Children and Youth should prepare a report on that conference; prior to submitting the report to the Implementation Committee the Provincial Advocate for Children and Youth should consult with PTOs and other First Nations associations.

**RECOMMENDATION 8:** the Ministry of the Attorney General, in consultation with the Implementation Committee, undertake a prompt and urgent review of the feasibility of, and mechanisms for, using the OHIP database to generate a database of First Nations individuals living on reserve for the purposes of compiling the jury roll.

**RECOMMENDATION 9:** in connection with this review, the Ministry of Attorney General and First Nations, in consultation with the Implementation Committee, consider all other potential sources for generating this database, including band residency information, Ministry of Transportation information and other records, and steps that might be taken to secure these records, such as a renewed memorandum of understanding between Ontario and the Federal government respecting band residency information or memorandums of understanding between Ontario and PTOs or First Nations, as appropriate.

**RECOMMENDATION 10:** the Ministry of the Attorney General, in consultation with the Implementation Committee, consider amending the questionnaire sent to prospective jurors to:

- (a) make the language as simple as possible;
- (b) translate the questionnaire into First Nations languages as appropriate;
- (c) remove the wording threatening a fine for non-compliance and replacing it with wording stating simply that Ontario law requires the recipient to complete and return the form because of the importance of the jury in ensuring fair trials under Ontario's justice system;
- (d) on the premise that a First Nations member living on reserve in Ontario satisfies the Canadian citizenship requirement under s. 2(b) of the *Juries Act*, add an option for First Nations individual to identify themselves as First Nations members or citizens rather than Canadian citizens;
- (e) enable First Nations elected officials, such as Chiefs and Councillors, as well as Elders, to be excluded from jury duty; and
- (f) provide, through an amendment to the *Juries Act*, for a more realistic period than the current five days for the return of jury questionnaires.

**RECOMMENDATION 11:** the Ministry of the Attorney General, in consultation with the Implementation Committee, consider implementing the practice from parts of the U.S., that when a jury summons or questionnaire is undeliverable or is not returned, another summons or questionnaire is sent out to a resident of the same postal code, thereby ensuring that nonresponsive prospective jurors do not undermine jury representativeness.



**RECOMMENDATION 12:** the Ministry of the Attorney General, in consultation with the Implementation Committee, consider a procedure whereby First Nations people on reserve could volunteer for jury service as a means of supplementing other jury source lists.

**RECOMMENDATION 13:** the Ministry of the Attorney General, in consultation with the Implementation Committee, consider enabling First Nations people not fluent in English or French to serve on juries by providing translation services and by amending the jury questionnaire accordingly to reflect this change.

**RECOMMENDATION 14:** the Ministry of the Attorney General, in consultation with the Implementation Committee, adopt measures to respond to the problem of First Nations individuals with criminal records for minor offences being automatically excluded from jury duty by:

- (a) amending the *Juries Act* provisions that exclude individuals who have been convicted of certain offences from inclusion on the jury roll, to make them consistent with the relevant *Criminal Code* provisions, which exclude a narrower group of individuals;
- (b) encouraging and providing advice and support for First Nations individuals to apply for pardons to remove criminal records; and
- (c) considering whether, after a certain period of time, an individual previously convicted of certain offences could become eligible again for jury service.

**RECOMMENDATION 15:** the Ministry of the Attorney General discuss with the Implementation Committee the advisability of recommending to the Attorney General of Canada an amendment to the *Criminal Code* that would prevent the use of peremptory challenges to discriminate against First Nations people serving on juries.

**RECOMMENDATION 16:** in view of the concerns I have heard and the fact that current jury compensation is not consistent with cost-of-living increases, I recommend that the Ministry of the Attorney General refer the issue of jury member compensation to the Implementation Committee for consideration and recommendation.

**RECOMMENDATION 17:** the Ministry of the Attorney General, in consultation with the Implementation Committee, institute a process that would allow for First Nations individuals to volunteer to be on the jury roll for the purposes of empanelling a jury for a coroner's inquest.

45. For a complete explanation of the recommendations, see paragraphs 347 to 386.

## 7. ACKNOWLEDGEMENT

46. The preparation of this Report would not have been possible without the participation and assistance of many First Nations people, including Chiefs, Councillors, Elders, members of reserves, provincial territorial organizations and their leaders, and even some First Nations students. I also benefitted greatly from the contributions of the lawyers who acted for various organizations and from government officials, all of whom were very fair and candid in their assessments of the shortcomings of current conditions.

47. It is my sincere hope that the trust that First Nations people have invested in this Independent Review process will be rewarded with prompt response and action by the Government of Ontario.

# PART II

## APPOINTMENT AND WORK OF THE INDEPENDENT REVIEW





## A. MANDATE OF THE INDEPENDENT REVIEW

48. I WAS APPOINTED TO CARRY OUT THIS INDEPENDENT REVIEW BY ORDER-IN-COUNCIL 1388/2011, DATED AUGUST 11, 2011. THE ORDER-IN-COUNCIL, A COPY OF WHICH IS ATTACHED AS APPENDIX A TO THIS REPORT, DIRECTED ME TO MAKE RECOMMENDATIONS:

- (a) to ensure and enhance the representation of First Nations persons living on reserve communities on the jury roll; and
- (b) to strengthen the understanding, cooperation and relationship between the Ministry of the Attorney General and First Nations on this issue.

49. The Order-in-Council responds to the fundamental problem of lack of representation of members of Ontario's First Nations communities on Ontario's jury roll. As described in this Report, this problem appears not only to have been longstanding, but to have worsened over the past decade. It was brought to a head as a result of a series of cases that arose over the last several years, two of which have made their way to the Court of Appeal for Ontario.

50. The first of the recent set of cases involved the empanelment of juries in coroner's inquests into the deaths of individuals living in First Nations communities. At the commencement of the inquests into the deaths of Jacy Pierre and Reggie Bushie, the families of the deceased contacted the Office of the Coroner and the Attorney General to express their concern about the underrepresentation of First Nations peoples on the jury roll for the District of Thunder Bay. Their concern was prompted by the discovery made during the 2008 inquest into the deaths of Jamie Goodwin and Ricardo Wesley ("the Kashechewan Inquest") that the Kenora District jury rolls contained names of members of only 14 of the 49 First Nations represented by Nishnawbe Aski Nation (NAN) and that not a single member of the Kashechewan First Nation was listed on the Kenora jury roll.<sup>2</sup>

51. Each family – and in the Bushie inquest, NAN – asked the presiding coroner to issue a summons to the Director of Court Operations so they could find out how the jury roll in the District of Thunder Bay was established. Both coroners refused to issue a summons. The Pierre family and NAN applied for judicial review of each coroner's decision and a stay of the inquests pending the hearing of their application. The court granted a stay of the Bushie inquest but refused to stay the Pierre inquest, which proceeded and was completed without the participation of the Pierre family. The Divisional Court dismissed the applications for judicial review. The Court of Appeal, in a decision reported as *Pierre v. McRae* (also referred to as *NAN v. Eden*), overturned this decision.<sup>3</sup> The Court of Appeal held that the families of Mr. Bushie and Mr. Pierre had adduced sufficient evidence to justify an inquiry into the representativeness of the jury rolls. The Court also ordered that the Director of Court Operations appear before both inquests to testify about the establishment of jury rolls in the Thunder Bay District. Following the Court of Appeal's decision, the coroner in the Bushie Inquest determined that the Thunder Bay District's jury roll was not representative, and ordered that the inquest be stayed until a representative jury roll is created.

52. The second set of proceedings arose out of appeals brought by First Nations defendants to set aside their criminal convictions on the basis that lack of representation of First Nations peoples on jury rolls had infringed their right to a representative jury. The defendant in *R. v. Kokopenace* learned of the Bushie inquest and the surrounding legal proceedings, and appealed his conviction on several grounds, including the unrepresentativeness of the jury roll for the Thunder Bay District.<sup>4</sup> The Court of Appeal dismissed all non-jury grounds of appeal, but adjourned the appeal to hear arguments about the jury composition

<sup>2</sup> *Pierre v. McRae*, 2011 ONCA 187 at para. 68.

<sup>3</sup> *Ibid.*

<sup>4</sup> *R. v. Kokopenace*, 2011 ONCA 536.

issue. The defendant in *R v. Spiers* appealed her conviction, and also pursued the jury composition issue.<sup>5</sup> These appeals were heard together by the Court of Appeal in May 2012, but at the time of writing the Court had not rendered its decision.

53. NAN is the political territorial organization representing the political, social and economic interests of 49 First Nations Reserve communities in Ontario. NAN's initiatives, aimed at addressing the issue of the underrepresentation of First Nations peoples on jury rolls, began following the Kashechewan Inquest. NAN became involved in the Bushie Inquest on behalf of Mr. Bushie's family, and brought the appeals described above to the Divisional Court and the Court of Appeal. NAN also intervened in the *Kokopenace* and *Spiers* appeals. Through its participation in the coroners inquests, the subsequent legal challenges and political action, NAN has been instrumental in helping to focus public and judicial scrutiny on the issue of Aboriginal underrepresentation on Ontario jury rolls and in setting up this Independent Review.

54. The mandate set out in the Order-in-Council is both relatively narrow and broad. On the one hand, I have been asked to examine the specific issue of lack of representation of First Nations peoples on Ontario's jury roll, and my recommendations are focused on that issue. On the other hand, there is a recognition in the Order-in-Council of the need to strengthen "the understanding, cooperation and relationship between the Ministry of the Attorney General and First Nations" in relation to the jury representation issue. As the Attorney General stated in his factum filed in the *Kokopenace* and *Spiers* appeals, my mandate is to probe "the important systemic issues surrounding low participation of Aboriginal people on juries".<sup>6</sup> As described further in this Report, in investigating these systemic issues, it has become clear to me that the issue of underrepresentation of First Nations peoples on the jury roll in this province is merely a symptom of the broader disease ailing Ontario's justice system as it relates to First Nations peoples in Ontario. Consequently, while I appreciate that my mandate is first and foremost to address the issue of the lack of representation of First Nations community members on the jury roll, I have found that this issue cannot be realistically addressed without considering these broader systemic issues.

55. I should also note that the Order-in-Council expressly directs me not to address certain matters in carrying out my review, and consequently I have not done so. For example, paragraph 7 of the Order-in-Council states that I shall not report "on any individual cases that are, have been, or may be subject to a criminal investigation or proceeding, inquest or other legal proceeding". As a result, although my Report makes reference to the jurisprudence relating to these matters as part of the background and context for my recommendations, I do not report on or make recommendations with respect to any of these individual cases. In addition, as required by paragraph 8 of the Order-in-Council, I have taken care to perform my duties without making any findings of fact in relation to misconduct, or expressing any conclusions or recommendations regarding the civil or criminal liability of any person or organization, and without interfering in any investigation or criminal or other legal proceeding.

56. The heart of my mandate is addressed in paragraphs 5 and 6 of the Order-in-Council, which direct me, in the conduct of my review, to hold consultations with First Nations communities and to invite and receive submissions in writing from any First Nation, First Nations political territorial organization, First Nations organization, and member of a First Nation as well as from any interested party, including ministries of government. It is through this consultation process, described in detail in the next section of the Report, that I have gained the greatest understanding of the fundamental systemic problems that underlie the issues I have been directed to review.

<sup>5</sup> *R v. Spiers* (2007), 76 W.C.B. (2d) 55 (O.N.S.C.J.).

<sup>6</sup> The Independent Review was provided with these materials by counsel with the agreement of the court. See para. 5 of the respondent's factum in *R v. Kokopenace*.



## B. WORK OF THE INDEPENDENT REVIEW

57. Shortly following the passage of Order-in-Council 1288/2011 on August 11, 2011, I began to assemble the legal team that would support my work for the Independent Review. John Terry, a partner with Torys LLP, was the first to join the team as lead counsel. In October, we recruited as associate counsel Candice Metallic, then a senior associate and now a partner with Maurice Law, Barristers and Solicitors. Together, my team and I began to develop a plan and engagement approach for the Independent Review.

58. We commenced the Independent Review with a process to gather information from all of those who have been involved in, or are affected by, the juries system in Ontario as it relates to the representation of First Nations peoples on the jury roll. After creating a website for the Independent Review, we set out to develop a process that would allow us to meet and receive submissions from interested First Nations leaders, communities and organizations, officials of the Ministry of Attorney General, Ministry of Health and Long-Term Care, the Provincial Advocate for Children and Youth, other service organizations, and members of the judiciary who have presided over cases or motions relating to the issues under review.

59. Hearing from the First Nations leadership, people and organizations as the first order of business was the best way, in my view, for me to understand and accurately define the systemic issues affecting First Nations peoples living in reserve communities as it relates to jury service. Given the vast diversity of First Nations and Treaty groups and organizations in the Province of Ontario, we determined that the engagement process must begin by introducing the Independent Review and inviting First Nations to participate in a manner they deemed appropriate. Accordingly, in November 2011, I sent a letter to all First Nations governments, and First Nations and Treaty organizations in Ontario, offering to meet with them, receive written submissions or accommodate a combination of both. A copy of this correspondence is attached as Appendix D to this Report.

60. Following the First Nations engagement process, described in more detail in Part IV, I prepared a Progress Report and a discussion paper that set out the issues identified by First Nations during the engagement process, and posed questions to solicit feedback on ways to address the challenges associated with the representation of First Nations peoples on juries. I prepared a summary progress report that was made available on our website, and a discussion paper that was sent to all First Nations in Ontario, First Nation and Treaty organizations, and interested Aboriginal service providers, seeking their further input. It is attached as Appendix F to this Report. The submissions we received are summarized in Part IV of this Report.

61. Once I became familiar with the issues from the First Nations perspective, we began to meet and have discussions with officials from the Ministry of the Attorney General, including the Court Services Division and the Provincial Jury Centre. We also met with some members of the judiciary who have presided over many cases involving First Nations offenders. Considering the large demographic of First Nations youth in Ontario, we also thought it useful to meet with the Provincial Advocate of Children and Youth in Ontario.

### 1. NISHNAWBE ASKI NATION

62. As described at paragraph 53 above, NAN had been intensely involved in legal and advocacy events leading up to the creation of the Independent Review. Accordingly, they were the first organization to submit a proposal for engagement, which we accepted. NAN proposed an engagement process similar to that adopted by Commissioner Mr. Justice Goudge in the Inquiry into Pediatric Forensic Pathology in Ontario. This approach entailed a preparatory meeting in each of the selected First Nations communities, followed by a meeting between community representatives, my team, and me. The preparatory team consisted of a NAN representative, former Grand Chief Bentley Cheechoo, and a translator, Jerry Sawanas, who provided advice and information required by each First Nation with which we met. NAN's legal team of two lawyers from the law firm Falconer Charney accompanied the NAN representatives to provide legal advice on the issues. The objectives of the preparatory meetings were to educate the leadership and community with

respect to the jury representation issue, to address any questions or concerns that may be raised, and to ensure that the community was sufficiently prepared for my visit. Following the preparatory meetings, a second visit was arranged whereby my legal team, NAN's preparatory team, and I attended the First Nations communities to discuss the issues.

63. As an important backdrop to the Independent Review, I want to acknowledge the seven young men from NAN First Nations who died while attending the Dennis Franklin Cromarty High School in Thunder Bay. In selecting the First Nations to be involved in the Independent Review engagement process, NAN respectfully and appropriately included the home First Nations of the young men who died in Thunder Bay, and also considered factors such as geographic location, size, and Tribal Council affiliation. Fifteen of NAN's 49 First Nations were identified by NAN to be visited during the Review. Owing to unanticipated events, such as inclement weather, deaths in the community, and other pressing matters that arose in First Nations communities, I was able to visit ten of the fifteen communities. The list of First Nations that I visited during this phase of the Review is attached as Appendix E to my Report. The outcomes of these sessions are summarized in Part IV of my Report.

## 2. UNION OF ONTARIO INDIANS

64. The Union of Ontario Indians, a political advocate for 39 Anishinabek First Nations in Ontario, submitted an engagement proposal and budget on behalf of its members, which we accepted. Having recently participated in a previous initiative funded by the Ministry of the Attorney General to conduct three discussion forums regarding juries in Anishinabek territory, the Union built upon this previous work and proposed to undertake five tasks for the Independent Review.

65. First, the Union assembled a steering committee that designed a process to engage their constituent First Nations in the Independent Review. Second, the Union prepared plain language backgrounders regarding the issue of the representation of First Nations peoples on juries for the purposes of dissemination in Anishinabek First Nations and institutions. Third, the Union commissioned external research reports to harness the knowledge, opinions, and suggestions of key organizations in the region. The authors of the independent research papers attended the engagement sessions to present their research and to contribute to fruitful discussions. These independent research reports are summarized in Part IV of this Report. Fourth, the Union originally planned to organize three consultation meetings at which First Nations individuals, leaders, and I were invited to attend to discuss the issue of the underrepresentation of First Nations peoples on juries. Of these three sessions, two were convened and one was cancelled. The summary of these sessions is found in Part IV of this Report. Finally, the Union prepared a Research Report and Submission that drew upon the outcomes of the Anishinabek engagement sessions as the basis for the Union's recommendations to me. The Union's submission is summarized in Part IV of this Report.

## 3. GRAND COUNCIL OF TREATY #3

66. The then Grand Chief of Treaty #3, Diane Kelly, and Chief Simon Fobister of Grassy Narrows First Nation met with me to discuss the issue of the representation of First Nations peoples on juries. After this meeting, the Grand Council of Treaty #3 submitted a proposal for a one-day meeting that was held at Wauzhushk Onigum First Nation, just outside Kenora. Eight Chiefs of Treaty #3 attended, along with technical advisors and Elders. The summary of this meeting appears in Part IV of this Report.



## 4. ABORIGINAL LEGAL SERVICES OF TORONTO

67. Aboriginal Legal Services of Toronto (ALST) submitted a two-part proposal, which we accepted. The first part involved the preparation of a comprehensive paper that addresses the jury representation issue and offers recommendations and solutions to the current problem of the underrepresentation of First Nations peoples on Ontario juries. ALST's comprehensive paper is summarized in Part IV of this Report. The second part of ALST's proposal involved convening a Families Forum at which my team and I met with some family members of First Nations victims whose deaths were subject to a coroner's inquest. The summary of this meeting is included in Part IV of this Report.

## 5. INDEPENDENT FIRST NATIONS

68. Finally, I received specific meeting requests from four First Nations that are unaffiliated with a tribal council or First Nation organization, which I gladly attended.

69. It is also important to note that we received submissions from various groups and individuals as outlined in Part IV.

70. I am most grateful to all of the First Nations and First Nation organizations that participated in the Independent Review. Their valuable assistance, generous contributions, and insightful perspectives have been of great benefit to me in writing my Report and developing the recommendations that, in my view, are required to enhance First Nations inclusion and participation on juries in Ontario. I am also equally grateful to the many judges, and court and government officials, who presented information, data, insights, and comments on the subject matter of the Review.

# PART III

## THE JURY SYSTEM AND FIRST NATIONS: PAST AND PRESENT



## A. INTRODUCTION

71. JURIES HAVE SERVED FOR GENERATIONS AS THE CORNERSTONE OF OUR JUSTICE SYSTEM, AS WELL AS A FUNDAMENTAL INSTITUTION IN THE ADMINISTRATION OF JUSTICE IN CIVILIZATIONS DATING BACK TO ANCIENT TIMES. UNFORTUNATELY, HOWEVER, AS I DESCRIBE BELOW, IT IS CLEAR THAT THE JURY SYSTEM AS IT HAS DEVELOPED AND OPERATED IN ONTARIO, LIKE ONTARIO'S JUSTICE SYSTEM IN GENERAL, HAS NOT OFTEN BEEN A FRIEND TO ABORIGINAL PEOPLE IN ONTARIO.

72. In this part of the Report, I describe a brief history of juries in Ontario, the jury selection system as it currently operates in Ontario, the requirement that a jury be representative, the representation of First Nations peoples on Ontario juries, and the jury selection experience in other jurisdictions with significant Aboriginal populations.

## B. BRIEF HISTORY OF JURIES IN ONTARIO

### 1. ROLE AND FUNCTIONS OF THE JURY

73. The jury as an institution has a long and distinguished history. References to jury-like bodies can be found in the history and mythology of early civilizations, including those of Egypt, Greece, and Scandinavia.<sup>7</sup> One of the earliest recorded jury-like bodies was established by the Greek King Solon around the end of the seventh century B.C.E. King Solon established two courts, which were presided over by a general assembly of Athenian citizens, called the *dikasteria*. Service on the *dikasteria* was open to any Athenian citizen aged 30 or over “who was not indebted to the state and whose civil rights had not been forfeited”.<sup>8</sup> This body held the power of appeal over civil and criminal matters, and, in performing this function, determined questions of fact and law, and voted in secret. Its judgments were not subject to appeal. The Athenian jury was transplanted to Rome around 451 to 450 B.C.E., and there is evidence that Rome brought the jury system to the territories it conquered.<sup>9</sup>

74. The jury system as we know it in Ontario evolved in Britain. According to nineteenth century British historian, William Forsyth, trial by jury was unknown in the British Isles before the Norman Conquest in 1066 C.E.<sup>10</sup> Following the Norman Conquest, there are several recorded instances of individuals being gathered to conduct inquests and make determinations on questions of fact and law. For example, William the Conqueror summoned juries in each county to make determinations as to the “value and manner of holdings of all property within the country.”<sup>11</sup> The jury that we know today emerged gradually under a series of kings following William, who empanelled juries to resolve disputes between the royal treasury and religious bodies over land ownership, and to determine guilt or innocence in criminal and civil matters.<sup>12</sup> The passage of the *Magna Carta* in 1215 by King John is credited by some as guaranteeing the right to trial by jury in Great Britain.<sup>13</sup> In 1275, trial by jury became mandatory in criminal proceedings

<sup>7</sup> See Lloyd E. Moore, *The Jury: Tool of Kings, Palladium of Liberty* (Cincinnati: W.H. Anderson Company, 1963), at chapter 1. Greek mythology speaks of the trial of Orestes, killer of his mother Clytemnestra (the wife of Agamemnon) as the “first jury trial of a mortal.” In deciding Orestes’ fate, the jury split with six votes cast for guilty and six votes for not guilty. However, the goddess Athena took pity on Orestes and cast her vote for an acquittal.

<sup>8</sup> *Ibid.*, at 2.

<sup>9</sup> *Ibid.*, at 3.

<sup>10</sup> William Forsyth, *History of Trial by Jury*, (London: John Parker and Sons, 1852) at 54.

<sup>11</sup> Moore, *supra* note 7 at 35.

<sup>12</sup> *Ibid.*, at 36-41.

<sup>13</sup> *Ibid.*, at 49-50. See also John Dawson, *A History of Lay Judges* (Harvard University Press: Cambridge Mass, 1960) at 289-290.

in Great Britain.<sup>14</sup> Many of the characteristics of modern juries emerged in the fifteenth and sixteenth centuries, including the right of the accused to challenge the composition of his or her jury panel, the use of juries to decide questions of fact (and not law), and the ability of juries to reach their own decision on the facts, rather than the decision demanded by the court.<sup>15</sup>

75. The last point is particularly relevant given the importance attributed today to the independence of the jury. Prior to the seventeenth century, jurors could be punished by the court for reaching the “wrong verdict” (doing so was considered perjury – lying to the court).<sup>16</sup> One of the most famous cases putting an end to this practice was the 1670 decision of *Bushell’s Case*. In *Bushell’s Case*, four jurors refused to convict two Quakers (a religious group) of “seditious preaching before an unlawful assembly.”<sup>17</sup> At that time, any religious gathering outside of the Church of England was deemed unlawful, and that law was frequently used to repress the Quakers. The judge accepted the jurors’ verdict of not guilty, but fined the jurors for reaching a verdict that was “contrary to the evidence and contrary to his instructions.”<sup>18</sup> When the jurors refused to pay, they were imprisoned.<sup>19</sup> Lord Vaughn, a judge at the Court of Common Pleas, overturned this decision, and, in so doing, emphasized that “unless the jury can act independently of the judge, it cannot command public support.”<sup>20</sup>

76. While we are separated by centuries from these foundational moments in the history of the jury, the developments in *Bushell’s Case* and others are still reflected in the modern rationales for the jury system, which, as the Supreme Court of Canada has stated, are “as compelling today as they were centuries ago”.<sup>21</sup> In its comprehensive 1980 examination of the jury system in Canada, the Law Reform Commission of Canada set out five major functions of the jury in modern criminal proceedings: (1) the jury is a fact-finder; (2) the jury acts as the conscience of the community in criminal proceedings; (3) the jury is the ultimate protection against oppressive laws and the oppressive enforcement of the law; (4) the jury is an educational institution; and (5) the jury helps to legitimize the criminal justice system.<sup>22</sup> These statements were adopted by the Supreme Court of Canada in *R. v. Sherratt*,<sup>23</sup> the Court’s major decision on the importance of a representative jury, and, in my view, are directly applicable in considering the issues discussed in this Report.

77. Similar roles are played by the jury in a coroner’s inquest. As discussed in more detail at paragraphs 85 to 89, the coroner system in Ontario was received with the rest of the common law from England in the mid-nineteenth century. Prior to a series of late-nineteenth century reforms in England, which took place well after the institution of the coroner was received in Ontario, coroner’s inquests were responsible for indicting people for homicide and committing accused persons to trial.<sup>24</sup> After a series of reforms in England, the focus of the Office of the Coroner shifted to investigating causes of death, rather than committing accused persons to trial.<sup>25</sup> Similar changes followed in Ontario through a series of laws enacted during the nineteenth

<sup>14</sup> Theodore Plucknett, *A Concise History of the Common Law*, 5th ed. (The Lawbook Exchange, Ltd.: New Jersey, 2011) at 126.

<sup>15</sup> Moore, *supra* note 7 at 68-69, 82, 89.

<sup>16</sup> R.A. Hughes, “Role of a Jury in a Criminal Case,” in Edson Haines, ed., *Special Lectures of the Law Society of Upper Canada 1959* (Toronto: The Law Society of Upper Canada, 1959) at 9.

<sup>17</sup> Simon Stern, “Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After *Bushell’s Case*” (2001-2002) 111 Yale L.J. 1815 at 1822.

<sup>18</sup> *Ibid.*, at 1823.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *R. v. Sherratt*, [1991] 1 S.C.R. 509. [*Sherratt*].

<sup>22</sup> Law Reform Commission of Canada, *Working Paper 27: The Jury in Criminal Trials* by Chairman Francis Muldoon (Ottawa: Minister of Supply and Services Canada, 1980).

<sup>23</sup> *Sherratt*, *supra* note 21 at para. 30.

<sup>24</sup> Ontario Law Reform Commission, *Report on the Coroner System in Ontario*, by Chairman Allan Leal (Toronto: Queen’s Printer, 1971) at 11. Christopher Granger, *Canadian Coroner Law: A Legal Study of Coroner and Medical Examiner Systems in Canada* (Toronto: The Carswell Company Ltd., 1984) at 35; where the author indicates that changes to the coroner’s system in England occurred after the office was transplanted to Canada.

<sup>25</sup> Granger, *Ibid.*



and twentieth centuries, and the use of coroner's inquests as a way of securing an indictment became obsolete.<sup>26</sup> Despite these changes, the jury remained "an essential component" of the modern inquest.<sup>27</sup> In performing its fact-finding role, the jury in a coroner's inquest, unlike in criminal or civil proceedings, does not make a finding of guilt or liability.<sup>28</sup> Rather, it is called upon to decide a series of questions related to the death and to make recommendations as to how such deaths may be prevented in the future.

78. Many of the early rationales for the jury continue to inform our use of the institution today, while at the same time, other, more modern, rationales have developed.<sup>29</sup> It is revealing that this institution, or others like it, has been used across human history in civilizations with little or no ties to one another, reflecting the broad appeal of an institution that enables members of the community to play a central role in the administration of justice.

79. However, in spite of the importance and longevity of the jury as an institution of justice, it is important to recall that, from the perspective of Aboriginal peoples in Canada, it has often been regarded as an instrument of injustice. Indeed, criminal jury trials in Canada were used at times as a tool to punish, what the British viewed as, disloyal behavior on the part of Aboriginal people, and to persecute the customary practices of First Nations on the grounds that they constituted criminal behaviour.

80. A notable example occurred in the aftermath of the 1885 Northwest Rebellion – an act of resistance and protest initiated by Métis and Cree leaders in Western Canada. Once the Rebellion came to an end, and charges were laid against the Aboriginal participants, juries, comprised of settlers who were incensed with the Métis and Cree for causing the Rebellion, tried and convicted a number of prominent leaders and their people of various criminal offences. The Métis leader, Louis Riel, was charged with high treason and convicted by a jury of six English and Scottish Protestants after only 30 minutes of deliberations. Riel was sentenced to death by hanging. Three Cree Chiefs – Chief Poundmaker, Chief Big Bear, and Chief One Arrow – along with eight other Cree men were tried for murder and found guilty by a jury of non-Aboriginal people after only 15 minutes of deliberations. Eight of the Cree men were sentenced to death by hanging and the three Chiefs were sentenced to three years in prison. Despite the Native casualties during the Rebellion, not one non-Native person was tried for the killing of Métis and Cree warriors. A priest wrote to the Archbishop criticizing the juries, "The jurymen are all Protestants, enemies of the Métis and the Indians, against whom they maintain bitter prejudices."<sup>30</sup>

81. During the engagement process for the Independent Review, I heard firsthand of the 1907 prosecution of two medicine men from the Sandy Lake First Nation in Northwestern Ontario for a customary act that was fundamentally incongruent with Canadian societal values of criminality. Jack and Joseph Fiddler were charged with the murder of a young woman who was possessed with what was known by the Anishinawbe as a "wendigo" or evil spirit that would bring harm and danger to the community. The two respected medicine men were asked by the family to perform this task and accordingly claimed to be acting in accordance with their customary roles and responsibilities. They were arrested by the Northwest Mounted Police, charged with murder and brought to Norway House in Manitoba, the location of a Hudson Bay Trading Post, for trial. Apparently, this was the first time the Fiddler brothers, who did not speak English, left their community and were brought into contact with non-Aboriginal people and the justice system. One brother, Jack Fiddler, took his own life before trial. Joseph Fiddler faced a completely foreign system without the aid of legal counsel. He was tried by a judge, who was a Commissioner of the Northwest Mounted Police involved in the original investigation, a lawyer from Winnipeg assigned to act as Crown Counsel, and a jury of six men from

<sup>26</sup> *Report on the Coroner System in Ontario*, *supra* note 24 at 25.

<sup>27</sup> *Ibid.*, at 94.

<sup>28</sup> Ontario Law Reform Commission, *Report on the Use of Jury Trials in Civil Cases*, by Chairman John McCamus (Ontario: Queen's Printer, 1994) at 92.

<sup>29</sup> *Sherratt*, *supra* note 21.

<sup>30</sup> Brian M. Brown, *Poundmaker, Big Bear, and the 1885 Rebellion* (1999), online: [alittlehistory.com](http://www.alittlehistory.com/NativeRb.htm) <<http://www.alittlehistory.com/NativeRb.htm>>.



Norway House. Joseph Fiddler was convicted of the crime and initially sentenced to death, which was later reduced to life in prison. Being an elderly and sick man, Joseph Fiddler died soon afterwards in custody.

82. According to historians who have examined this trial, it was intended to serve as a signal to other First Nations that “wendigo” killings were not tolerable and such behavior would be punished.<sup>31</sup> However, in so doing, it forever scarred the First Nations perception of the criminal justice system, particularly among members of the Sandy Lake First Nation, and contributes to their aversion to participate in it.

83. The relationship between the Canadian justice system and Canada’s Aboriginal peoples continues to be troubled. A glaring example of these problems was revealed in the *Report of the Royal Commission on the Donald Marshall, Jr., Prosecution*.<sup>32</sup> Although Donald Marshall, Jr., who was wrongfully convicted of murder and served 12 years in prison, did not elect to have a trial by jury, the utter failure of the criminal justice system as administered by the police, investigators, lawyers, Attorney General, and courts drew national attention to the issue of systemic discrimination in the justice system. The Royal Commission found that the miscarriage of justice in his case was directly attributable to the fact that Donald Marshall Jr. was a Mi’kmaq person. Given what I have heard while conducting the Independent Review, I unfortunately expect that a disturbing number of First Nations people in Ontario can relate to the circumstances endured by Donald Marshall, Jr.

84. I have mentioned the examples from Riel, Fiddler, and Marshall to illustrate the stains of mistreatment and injustice that to this day continue to influence the attitudes of First Nations people towards the Canadian justice system.

## 2. A BRIEF HISTORY OF THE JURY SYSTEM AND THE JURY SELECTION PROCESS IN ONTARIO

85. Juries have been used in criminal proceedings in Ontario since 1763, in civil proceedings since 1792, and in coroner’s inquests since at least 1763. Prior to 1763, what is now Canada was, at least from the perspective of non-Aboriginal settlers and the European powers, a French colony governed by the law of France. During that period, trial by jury in criminal and civil proceedings does not appear to have been commonplace. Following the French defeat by the British in the Seven Years’ War, France and Britain signed the *Treaty of Paris* in 1763, which ceded territory in Canada claimed by France to the British. That same year, King George III of England signed the *Royal Proclamation of 1763*.<sup>33</sup> The Royal Proclamation stipulated that private law in Canada – the law of contracts, family law, estates and successions, among other things – remained the French civil law, but English law was adopted for the administration of criminal justice.<sup>34</sup> As a result, the jury and the Office of the Coroner were introduced into Canadian criminal law.

86. In 1791, Upper Canada (now Ontario) was divided from Lower Canada (now Quebec) as a result of the *Constitutional Act, 1791*, and, in that year, Upper Canada received its own constitution.<sup>35</sup> These changes introduced the English jury system in its entirety to Upper Canada; juries in criminal proceedings were already commonplace, and they were introduced in civil proceedings by the *1792 Act to Establish Trials by Jury*.<sup>36</sup> The language of this Act demonstrates the high regard in which the institution of the jury was held:

<sup>31</sup> Thomas Fiddler and James R. Stevens, *Killing the Shamen* (Manotick, ON: Penumbra Press, 1985) at 73.

<sup>32</sup> The Royal Commission on the Donald Marshall, Jr., Prosecution, *Digest of Findings and Recommendations*, by Chief Justice T. Alexander Hickman (Halifax: McCurdy’s Printing and Typesetting Limited, 1989).

<sup>33</sup> Graham Parker, “Trial by Jury in Canada” (1987) 8 Osgoode Hall L.J. 178 at 178.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, at 180.

<sup>36</sup> *Ibid.* See also *An Act to Establish Trials by Jury*, Upper Canada Statutes, 1792, c. 2.



Whereas trial by jury has been long established and approved in our mother country, and is one of the chief benefits to be attained by a free constitution, be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the legislative council and assembly of the province of Upper Canada, [...] all and every issue and issues of fact, which shall be joined in any action, real, personal, or mixed, and brought in any of his Majesty's courts of justice within the province aforesaid, shall be tried and determined by a unanimous verdict of twelve jurors, duly sworn for the trial of such issue or issues, which jurors shall be summoned and taken conformably to the law and custom of England.<sup>37</sup>

87. In line with these reforms, the Upper Canada Legislature established the Court of King's Bench (now the Superior Court) to hear criminal cases and certain civil cases, and other courts to hear the remainder of the civil cases.<sup>38</sup> Juries were used in all of these courts.<sup>39</sup> While they have since fallen out of use in all Canadian provinces, grand juries were also used to assess evidence adduced to determine whether a criminal indictment was appropriate.<sup>40</sup>

88. The Office of the Coroner was transplanted into Canada with the introduction of English criminal law.<sup>41</sup> It seems probable that early coroner's inquests employed juries, since this practice was common in England.<sup>42</sup> The first formal legislative enactment governing the Office of the Coroner in Upper Canada was the 1850 *Act to amend the Law respecting the office of the Coroner*.<sup>43</sup> The 1850 Act permitted the coroner to summon a jury for inquests into deaths by violent or negligent means and required that a jury be summoned for inquests into the deaths of individuals who died while in custody (this requirement remains the case today).<sup>44</sup> The law respecting coroner's inquests has since been modernized and the Office of the Coroner enhanced in various ways,<sup>45</sup> but the role of the jury (now a five-person jury) remains a fundamental part of every inquest.

89. The process for selecting jurors for trials was a highly contentious political issue in pre-Confederation Canada that first served as a catalyst for widespread reforms to the jury system, and subsequently contributed to the relative decline in the use of the jury. The *Act to Establish Trials by Jury* provided that "jurors shall be summoned and taken conformably to the law and custom of England". However, the selection process for comparatively densely populated late eighteenth and early nineteenth century England did not translate well to sparsely populated Upper Canada. In late eighteenth century England, constables were responsible for identifying men who met the requisite property requirements for jury service. Constables would post jurors lists on the local church door for three weeks, to allow people to identify any errors or omissions.<sup>46</sup> Subsequently, these lists were certified by a local justice and the names were transcribed into a jurors' book, from which prospective jurors were drawn. Since this process transferred poorly into Upper Canada, the legislature passed the *Act for the Regulation of Juries* in 1794, which provided that every year the clerk of the peace in each district would compose a list of prospective jurors (all male householders) and provide it to the sheriff.<sup>47</sup> From this list, the sheriff would select 36 to 48 names before a trial, from which 12 were randomly selected for jury service. Often, as discussed in the next section of this Report, the sheriff simply chose people living in the same neighborhood to reduce the costs associated with summoning jurors.

<sup>37</sup> *An Act to Establish Trials by Jury*, *ibid.*

<sup>38</sup> R. Blake Brown, *A Trying Question: The Jury in Nineteenth Century Canada* (Toronto: Osgoode Society for Canadian Legal History, 2009) at 44.

<sup>39</sup> *Ibid.*, at 45.

<sup>40</sup> *Ibid.*

<sup>41</sup> J.C.E. Wood, "Discovering the Ontario Inquest" (1967) 5 Osgoode Hall L.J. 243 at 246.

<sup>42</sup> See Christopher Granger, *Canadian Coroner Law: A Legal Study of Coroner and Medical Examiner Systems in Canada* (Toronto: The Carswell Company Ltd., 1984) at 15, 28.

<sup>43</sup> *Act to amend the Law respecting the office of the Coroner*, 1850, Upper Canada Statutes, c. 56.

<sup>44</sup> Ontario Law Reform Commission, *Report on the Law of Coroners* by Chairman John McCamus (Ontario: Queen's Printer, 1995).

<sup>45</sup> See the current *Coroner's Act*, R.S.O. 1990, c. C.37, attached to this Report as Appendix C.

<sup>46</sup> R. Blake Brown, *supra* note 38 at 45.

<sup>47</sup> R. Blake Brown, *Ibid.* *An Act for the Regulation of Juries*, Upper Canada Statutes, 1794 c. 1.

90. This system generated considerable controversy, as critics expressed concern that sheriffs were abusing their position by packing juries to ensure specific outcomes in trials. Between 1800 and 1850, there were increasing calls to strip the sheriff of his power to appoint jury panels.<sup>48</sup> In the aftermath of the 1837 Rebellions, for example, there was widespread belief that government officials had packed juries to ensure the convictions of accused rebels. The drive towards reform culminated in 1850 with the passage of the *Upper Canada Jurors' Act of 1850*.<sup>49</sup> The 1850 Act introduced significant changes to the jury system, including a complex system for juror selection that involved a local “committee of selectors” in each township, which created lists of prospective jurors that were forwarded to the clerk of the peace, and subsequently to the sheriff for juror selection.<sup>50</sup> While the 1850 Act was effective in ending claims of packed juries, it significantly increased the costs of the jury system, which – as will be discussed in the next part of this section – was a major reason for the jury’s decline in the nineteenth and twentieth centuries.

91. The increased costs of the jury system as a result of the 1850 Act, as well as general citizen dissatisfaction about the inconvenience of serving on juries, once again spurred reform efforts. A series of failed jury reform bills following the enactment of the 1850 Act eventually culminated in the passage in 1879 of *An Act to Amend the Jurors Act*.<sup>51</sup> This Act simplified juror eligibility by setting the minimum property requirements at \$600 or more for people living in cities, and \$400 or more for people living in towns and villages.<sup>52</sup> These property requirements were to remain in place until 1972. The proponents of this Act rejected using the voters’ list as a basis for selecting possible jurors because, in their view, “there are many on the voters’ list who would be anything but satisfactory jurymen.”<sup>53</sup> The 1879 Act also simplified the process for juror selection in order to reduce costs.

### 3. DECLINE IN THE USE OF JURIES FROM THE NINETEENTH TO THE TWENTIETH CENTURY

92. The late-nineteenth century marked the beginning of a decline in the use of juries in Ontario. In addition to the reasons already discussed – high costs and inconvenience – one author attributes the decline to the entrenchment of responsible government.<sup>54</sup> Juries had served as a bulwark against oppressive laws and oppressive government. However, the establishment of democratically elected legislative assemblies in the provinces of Canada helped to assuage fears of tyrannical government and undermine this rationale for the use of juries

93. The decline in the use of juries was especially apparent in civil proceedings. Prior to the 1860s, in civil proceedings, trial by jury was the only form of trial recognized by the Courts of common law.<sup>55</sup> In 1868, the presumption that civil trials were to be tried by a jury was reversed after the Ontario legislature passed the *Law Reform Act of 1868*.<sup>56</sup> Following passage of that Act, civil actions were tried before a jury only when it was requested by one of the parties. Five years later, the Ontario legislature passed the *1873 Act for the better administration of Justice in the Courts of Ontario*.<sup>57</sup> This Act required the permission of a judge for a jury to be called for all but a select number of civil causes of action, including libel and malicious prosecution. However, the parties could still choose to waive the jury for a trial involving one of those

<sup>48</sup> R. Blake Brown, *ibid* at 88.

<sup>49</sup> *Upper Canada Jurors' Act of 1850*, Upper Canada Statutes, 1850 c. 5.

<sup>50</sup> R. Blake Brown, *supra* note 38 at 135-138.

<sup>51</sup> *An Act to Amend the Jurors' Act*, S.O. 1879, c. 14.

<sup>52</sup> R. Blake Brown, *supra* note 38 at 144.

<sup>53</sup> *Ibid.*, at 213.

<sup>54</sup> *Ibid.*, at 217.

<sup>55</sup> The Honourable Mr. Justice Todd L. Archibald & Robert L. Gain, “The Breadth of Civil Jury Trials in Canada: Their History and Availability” in The Honourable Mr. Justice Todd L. Archibald & The Honourable Mr. Justice Randall Scott Echlin, *Annual Review of Civil Litigation*, 2007 edition, (Toronto: Thomson Canada Limited, 2007) 139 at 141.

<sup>56</sup> *Law Reform Act of 1868*, S.O. 1868, c. 6, s. 18(1).

<sup>57</sup> *Act for the better administration of Justice in the Courts of Ontario*, S.O. 1873, c. 8.



causes of action.<sup>58</sup> Since then, not only has the use of the jury declined, but there have also been calls for its abolition in civil proceedings. For instance, in 1968 the Ontario Royal Commission Inquiry into Civil Rights recommended that civil juries be abolished altogether except in defamation cases: “the conclusion we have come to is that the trial of civil cases by a jury is a procedure that has outlived its usefulness in Ontario.”<sup>59</sup> However, when the Ontario Law Reform Commission examined this issue in 1994, it concluded that civil juries are appropriate in certain cases and therefore should remain available.<sup>60</sup>

94. Currently, civil juries are available in principle for all but a small range of actions, including actions for an injunction, equitable relief, or relief against a municipality.<sup>61</sup> Before proceeding to trial, the parties to a civil action can elect a trial by jury under the *Ontario Rules of Civil Procedure*.<sup>62</sup> In practice however, civil juries are rarely used outside of a narrow range of actions, including defamation.

95. The use of jury trials also declined in criminal proceedings, though not as precipitously as in civil proceedings. This decline was largely attributable to a series of laws passed by the Upper Canada Legislature and, following Confederation, by the Parliament of Canada. The Upper Canada Legislature enacted a law in 1834 which provided that certain types of offences, such as minor assaults and some crimes against the property of another, could be tried by a justice of the peace sitting without a jury.<sup>63</sup> In 1869, the newly constituted Parliament of Canada passed the *Speedy Trials Act*, which broadened the scope of offences that could be tried before a judge alone if the accused consented.<sup>64</sup> Parliament passed the first *Criminal Code* in 1892, which applied in all parts of the country. Under the *Criminal Code*, trial before a judge and jury was necessary for the most serious offences, including treason and murder.<sup>65</sup> However, certain other types of offences, such as assault or theft below a certain value, were triable by way of summary trial before a judge sitting alone if the accused so elected.<sup>66</sup> Similarly, young offenders could elect to be tried by a jury or a judge sitting alone.<sup>67</sup> The 1892 *Criminal Code* remains the basis for modern criminal law, and, consequently, many of the provisions it made for trial by jury remain (with some changes) today. In 1980, the Law Reform Commission of Canada recommended keeping the criminal jury, since “it performs a number of valuable functions in the criminal justice system”, as I have discussed above.<sup>68</sup>

96. Currently, the rights of an accused to be tried by a jury are governed by the *Canadian Charter of Rights and Freedoms* and the *Criminal Code*. Under *Charter* section 11(f), any person charged with an offence has the right “except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment”. As a result, at a minimum, those facing five or more years imprisonment are guaranteed the right to a trial by jury. The *Criminal Code* divides offences into three types: indictable offences, summary conviction offences, and hybrid offences.<sup>69</sup> Indictable offences include “the most serious crimes”, such as murder and treason.<sup>70</sup> As a general rule, these offences must be tried by a judge and jury

<sup>58</sup> *Ibid.*, at c. 8, s. 16-17.

<sup>59</sup> *Ontario Royal Commission Inquiry into Civil Rights* by Commissioner James Chalmers McRuer, Report No. 1, Vol. 2 (Toronto: Queen's Printer, 1968) at 859.

<sup>60</sup> Ontario Law Reform Commission, *Report on the Use of Jury Trials in Civil Cases* by Chairman John McCamus, (Ontario: Queen's Printer, 1994) at 90.

<sup>61</sup> *Courts of Justice Act*, R.S.O. 1990, c.43, s. 108.

<sup>62</sup> *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, s. 47.01.

<sup>63</sup> *An Act to provide for the summary punishment of Petty Trespasses, and other offences*, Upper Canada Statutes 1834, c. 4.

<sup>64</sup> R. Blake Brown, *A Trying Question: The Jury in Nineteenth Century Canada*, (Toronto: Osgoode Society for Canadian Legal History, 2009) at 199. *An Act for more speedy trial, in certain cases, of persons charged with felonies and misdemeanors, in the Provinces of Ontario and Quebec*, S.C. 1869, c. 34.

<sup>65</sup> Neil Vidmar, “The Canadian Criminal Jury: Searching for a Middle Ground” (1999) 62 *Law and Contemporary Problems* 141 at 146.

<sup>66</sup> *Criminal Code*, S.C. 1894, c. 29, s. 783, 786.

<sup>67</sup> *Ibid.*, at c. 29, s. 818.

<sup>68</sup> Law Reform Commission of Canada, *Working Paper 27: The Jury in Criminal Trials* by Chairman Francis Muldoon (Ottawa: Minister of Supply and Services Canada, 1980) at 2.

<sup>69</sup> *Criminal Code*, *supra* note 66 at Part XIX – Indictable Offences, and Part XXVII – Summary Convictions.

<sup>70</sup> See also *Criminal Code*, R.S.C., 1985, c. C-46, s. 469.

unless both the accused and the Attorney General consent to a trial before a judge alone.<sup>71</sup> Summary offences, such as impaired driving, carry maximum penalties of six months in prison and fines of up to \$5000, and are tried before a judge alone.<sup>72</sup> There is no right to a jury for a summary conviction trial.<sup>73</sup> Finally, hybrid crimes, such as assault, fraud, and drug offences can be tried as indictments or summary offences, and the decision to proceed as one or the other is solely at the discretion of the Attorney General. If the Attorney General chooses to proceed by way of indictment, the accused can opt to be tried by a jury.<sup>74</sup>

97. The jury is still an important part of our criminal justice system. According to a 2011 Canadian Broadcasting Corporation news story, of the more than 600,000 criminal charges laid in Ontario between April 1, 2009 and March 31, 2010, 513 criminal indictments were disposed of by a judge and jury, as opposed to 340 by a judge sitting alone.<sup>75</sup> However, many of the issues affecting juries during the nineteenth century that I have briefly considered remain live issues today. For instance, the burden and inconvenience of serving on juries was recently highlighted in the same CBC story. In Ontario, jurors are paid nothing for the first ten days of a trial, \$40 for everyday thereafter up to the fiftieth day of trial, and \$100 a day thereafter. This lack of payment, among other difficulties, is contributing to an increase in the number of individuals who do not attend at court after being summoned.

## C. THE JURY SELECTION SYSTEM AS IT CURRENTLY OPERATES IN ONTARIO

98. The machinery of the jury system in Ontario today is governed by the 1990 *Juries Act* (attached as Appendix B to the Report), which sets out the process for establishing jury rolls in the province's judicial districts.<sup>76</sup> Under that Act, the sheriff in each county and the Director of Assessment are responsible for compiling an annual jurors list, though in practice the sheriff's responsibilities have been delegated to the Provincial Jury Center (PJC) in London, Ontario and to local court officials.

99. During the spring of each year, we understand that the Court Services staff at each local Ontario Superior Court, in consultation with local judges, provide an estimate to the Provincial Jury Center of the number of jurors that will be required for all jury trials in the upcoming year. Once the required number has been determined, the Provincial Jury Centre informs the Municipal Property Assessment Corporation (MPAC) of the number of jurors that will be required. MPAC selects names at random from the list of municipal residents within each county and district, and forwards these names to a third party which is responsible for sending out jury questionnaires. As discussed at paragraph 41 of the Report, section 6(8) of the *Juries Act* requires the names of individuals living in First Nations communities to be acquired using any available record, since their names are not contained in MPAC record.

<sup>71</sup> *Ibid.*, *Criminal Code* at c. C-46, s. 473(1).

<sup>72</sup> *Ibid.*, c. C-46, s. 787.

<sup>73</sup> *Criminal Code*, *supra* note 66 at Part XXVII – Summary Convictions.

<sup>74</sup> *Ibid.*, at 147.

<sup>75</sup> Kazi Stastna, "Jury Duty: Unfair burden or civic obligation?" *CBC News* (8 November 2011) online: CBC News <<http://www.cbc.ca/news/canada/story/2011/11/06/f-juries-analysis.html>>.

<sup>76</sup> *Juries Act*, R.S.O. 1990, c. J. 3. *Juries Act*, R.R.O. 1990, Reg. 680. There seems to be confusion as to the delineation of jury districts, and the terminology used. Section 5(2) of the *Juries Act* addresses "territorial districts", while s. 10 of Regulation 680 under the *Juries Act* establishes two "jury areas," but does not identify the rest of the province's jury areas. It is regrettable that there is no publically available source of information identifying Ontario's jury districts or areas, or providing a map thereof. This lack of transparency seems to give rise to confusion, and warrants clarification.





100. Questionnaires are sent to all persons identified by MPAC, who after receiving a questionnaire must complete and return it within five days. The Ministry of Finance, acting as an agent of the Provincial Jury Centre, compiles the names of eligible jurors based on the responses in the questionnaires and forwards this information to the Provincial Jury Centre. Using this information, the Provincial Jury Centre compiles the jury rolls for the upcoming year for each county or district in the province.<sup>77</sup>



101. Jury panels for trials are randomly selected from the jury rolls compiled by the Provincial Jury Centre for each Superior Court when the need so arises. The panel is a group of people from which the *petit jury*, meaning the jury who sits on a trial, will be selected. Those selected for the jury panel are issued a summons requiring them to attend at the court where the trial will take place for jury selection. In criminal proceedings, both the Crown and the defence are given the opportunity under the *Criminal Code* to challenge prospective jurors, meaning that either side can ask that certain jurors be excused. Either side can challenge an unlimited number of prospective jurors “for cause”, typically on the basis that the prospective juror will not be “indifferent between the Queen and the accused”.<sup>78</sup> Depending on the type of crime being tried, both sides are also given between four and 20 “peremptory challenges”, meaning that the prospective juror can be asked to stand aside without providing a reason.<sup>79</sup> Prospective jurors can also ask to stand aside on the basis of illness or that service will impose on them an undue hardship. When this process is complete, a group of 12 jurors will remain to serve on the *petit jury*. The parties to a civil proceeding select jurors in a similar manner, except only six jurors are chosen to serve on the *petit jury*.<sup>80</sup>

102. Juries for coroner’s inquests are also selected from the jury roll prepared by the Provincial Jury Centre. When the coroner begins an inquest, he or she issues a warrant that requires the Provincial Jury Centre to provide a list of jurors living in the area where the death occurred. The Coroner’s Constable then selects the names of people whom he or she believes to be “suitable to serve as jurors at an inquest” from that list and issues summonses requiring them to attend at the place of inquest.<sup>81</sup> As in the case of criminal or civil proceedings, prospective jurors may be dismissed if serving would cause undue hardship or if there is reason to believe that, because of bias, they may not be able to reach a verdict based on the evidence. From the group of prospective jurors, five are chosen to serve on the inquest.

103. Jury selection for coroner’s inquests does not emphasize randomness in the same way as jury selection for civil or criminal trials. The role of a jury in a coroner’s inquest is to make recommendations based on the evidence presented to them, not to make a finding of guilt or liability. In fact, coroner’s juries are prohibited from making findings of legal responsibility. As a result, the imperative existing in criminal trials in particular that emphasizes trial fairness through a representative jury is not present in a coroner’s inquest. Of course, the jury roll from which prospective jurors are drawn has to be representative; as I described in paragraph 51 above, the coroner suspended the Bushie Inquest after it was determined that the jury roll was not representative. However, often the members of a coroner’s jury are selected from the area where the death took place, since people who reside in that area may be better able to make recommendations tailored to local needs and conditions.

<sup>77</sup> Affidavit of Shawn Joy, sworn on July 19, 2011, filed in *R. v. Kokopenace* at para. 5.

<sup>78</sup> *Criminal Code*, R.S.C., 1985, c. C-46, s. 638(1)(b).

<sup>79</sup> *Ibid.*, at c. C-46, s. 634.

<sup>80</sup> *Courts of Justice Act*, R.S.O. 1990, Chapter C.43, s. 108.

<sup>81</sup> *Coroners Act*, RSO 1990, c. C.37, s. 33(2).

## D. REQUIREMENT THAT A JURY BE REPRESENTATIVE

104. The requirement that a jury be representative is a bedrock principle governing the formation of the modern jury. As Madam Justice L’Heureux-Dube, writing for a majority of the Supreme Court of Canada in the 1991 *R. v. Sherratt* case, stated, the modern jury “was envisioned as a representative cross-section of society, honestly and fairly chosen”.<sup>82</sup> My mandate as Independent Reviewer is not to determine whether the jury roll as it applies to First Nations communities is representative as a matter of law; that issue has been and continues to be dealt with before the courts and other bodies. But I believe it is important, nevertheless, for me to outline the background to and some of the case law respecting representativeness as part of the context for the recommendations in my Report.

### 1. HISTORY AND EVOLUTION OF THE PRINCIPLE OF A REPRESENTATIVE JURY

105. The principle that a jury must be representative of a fair cross-section of the community is a relatively recent one in North America. Historically, jury service in Ontario was limited to men who owned property. The property requirement for jury service was rooted in the history of the jury in the United Kingdom, which required, for example, during the sixteenth century that jurors own a freehold with a certain minimum value in the county where the crime took place.<sup>83</sup> The property requirements for jury service in Ontario were strict; only men owning houses or land with a minimum rateable value were called to serve on juries, likely resulting in the jury pool being limited to the wealthiest among an already narrow pool of eligible citizens. The 1877 *Jurors Act* provided, for example, that the jury roll would be established by compiling a list from the property assessment roll “commencing with the name of the person rated at the highest amount on such roll and proceeding successively towards the name of the person rated at the lowest amount, until the names of one half of the persons assessed upon such roll have been copied from the same”.<sup>84</sup>

106. The already small pool of potential jurors in Ontario was further narrowed by the selection process. Often, the sheriff selected jurors from a single neighborhood to minimize the costs associated with summoning prospective jurors. Consequently, jury membership was decidedly unrepresentative. Juries were frequently composed of members of the upper class selected from the same neighborhood, who sat in judgment of those charged with criminal offences.

107. Minimum property requirements as a condition for jury eligibility remained the rule in Ontario until 1972. Following changes in 1972, eligibility for jury duty was determined by whether a person was listed on the most recent polling list registered under the *Municipal Elections Act*. A year later in 1973 this system for determining eligibility was changed, and all Canadians citizens aged eighteen to sixty-nine years became eligible to serve on a jury. That same year, the *Juries Act* was amended to require the sheriff to include the names of members of First Nation communities on the jury roll by obtaining those names “from any record available” – a provision now included in section 6(8) of the *Juries Act*, discussed in more detail in subsequent parts of the Report.<sup>85</sup>

108. The principle of a constitutional right to a representative jury emerged in United States jurisprudence long before it developed in Ontario or anywhere else in Canada. Historically, African-Americans were excluded from the jury source lists of many states, especially in the South. While in Canada the issue of jury representativeness was not dealt with extensively by the courts until the enactment of the *Charter*, the United States Supreme Court played an important role in that country in developing the safeguards guaranteeing a representative jury. The Sixth Amendment to the United States Constitution provides the right to be tried

<sup>82</sup> *R. v. Sherratt*, [1991] S.C.J. No. 21 at para. 31.

<sup>83</sup> Lloyd E. Moore, *The Jury: Tool of Kings, Palladium of Liberty* (Cincinnati: W.H. Anderson Company, 1963) at 68.

<sup>84</sup> *The Jurors Act*, R.S.O. 1877, c. 48, s. 6.

<sup>85</sup> *An Act to Amend the Jurors’ Act*, R.S.O. 1973 c. 81, s. 5.



by “an impartial jury of the state and district wherein the crime shall have been committed”.<sup>86</sup> This phrase has been interpreted by the Supreme Court as guaranteeing the right to a representative jury, and the Court has used it to strike down laws and practices that were aimed at excluding African-Americans from the jury pool.

109. The first Supreme Court decision addressing this issue was *Strauder v. West Virginia* (1880).<sup>87</sup> In *Strauder*, the accused, an African-American, was tried and convicted – by an all-white jury – of murdering his wife. At the time, West Virginia law prohibited African-Americans from serving on juries in the state. In its decision, the Supreme Court invalidated the West Virginia law on the basis that it violated the right of African-American defendants to the equal protection of the law.<sup>88</sup> The decision in *Strauder*, as two commentators have noted, “effectively (if indirectly) recognized the right of African-Americans to serve on juries.”<sup>89</sup> However, it did not end the matter, and the extent to which African-Americans were excluded from juries varied across the country. Southern jurisdictions continued to exclude African-Americans from juries for decades to come; however, these practices were gradually eliminated through a series of important Supreme Court decisions, discussed below.

110. In 1935, the Supreme Court released two seminal decisions overturning the convictions of African-American men by different all-white juries in Alabama, where African-Americans were systematically excluded from jury service. These cases were heard concurrently and involved nine African-American men who were accused of raping two white women. These men were commonly referred to as the Scottsboro Boys. The first case, *Norris v. Alabama* (1935), set the precedent that excluding African-Americans from the jury source list violated the constitutional right of an African-American accused of a crime to the equal protection of the law.<sup>90</sup> In that case, one of the Scottsboro Boys had been convicted by an all-white jury. The conviction was appealed and was overturned by the United State Supreme Court. The Court held that the exclusion of African-Americans from the jury source list in Alabama implied to the Court that discrimination existed, and this exclusion provided a sufficient basis for overturning the conviction. The second case was *Patterson v. Alabama* (1935), where the Court followed its decision in *Norris* and set aside the convictions of two more of the Scottsboro Boys who had also been convicted by an all-white jury.<sup>91</sup>

111. Since these decisions, the United States Supreme Court has interpreted the Sixth Amendment in ways that have strengthened the right to a representative jury.<sup>92</sup> In *Thiel v. Southern Pac Co.* (1946) the Court interpreted this constitutional guarantee as requiring that the jury be “chosen from a representative cross-section of the community”.<sup>93</sup> The Court has since developed two standards for testing the representativeness of juror lists: the equal protection standard and the fair cross-section standard. The equal protection standard forbids the exclusion of individuals from jury source lists on the basis of intentional discrimination, as well as any measures that are “susceptible to being used to exclude” groups of persons from the jury list.<sup>94</sup> The fair cross-section standard guarantees all those charged with an offence the right to a representative jury source list.<sup>95</sup> Moreover, in 1968 the Supreme Court decided in *Duncan v. Louisiana* that the Sixth Amendment, which the Court has found to protect (among other things) the right to a representative

<sup>86</sup> U.S. Constitution. amend. VI.

<sup>87</sup> *Strauder v. West Virginia* (1880), 100 U.S. 303.

<sup>88</sup> David Kairys, Joseph Kadane and John Lehoczy, “Jury Representativeness: A Mandate for Multiple Source Lists” (1977) *California L.R.*, Vol. 65, No. 4 at 780. Albert Alschuler and Andrew Deiss, “A Brief History of the Criminal Jury in the United States” (1994) 61 *The University of Chicago L.R.* 867 at 893.

<sup>89</sup> Albert Alschuler and Andrew Deiss, *Ibid.*, at 894.

<sup>90</sup> *Norris v. Alabama* (1935), 294 U.S. 587.

<sup>91</sup> *Patterson v. Alabama* (1935), 294 U.S. 600.

<sup>92</sup> Cynthia Williams, “Jury Source Representativeness and the Use of Voter Registration Lists” (1990) 65 *New York University L.R.* 591 at 591.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*, at 596.

<sup>95</sup> *Ibid.*, at 598.

jury, applies to proceedings in state courts.<sup>96</sup> Finally, in *Batson v. Kentucky* (1986) the Supreme Court decided that peremptory challenges to prospective jurors (meaning challenges that allow the defence or the prosecution to ask that a prospective juror be excused without providing a reason) cannot be used to eliminate prospective jurors on the basis of race.<sup>97</sup>

112. Outright discrimination against African-Americans and other minorities was not the only means used to exclude them from jury source lists. In many states, prospective jurors were selected using a 'key man' system. The 'key man' was a prominent member of the community, such as a minister or a local banker, who was responsible for submitting lists of prospective jurors to the jury commissioner.<sup>98</sup> The commissioner would then compile a list of prospective jurors based on the names provided by the 'key man'.<sup>99</sup> However, the difficulties of ensuring a representative jury using the key man system are apparent; the selection of prospective jurors was subject to the beliefs and biases of the key men, who would often "draw upon their limited circle of acquaintances" in selecting potential jurors.<sup>100</sup>

113. It was widely acknowledged and recognized by Congress that the 'key man' system resulted in the underrepresentation of minorities on juries.<sup>101</sup> In response to the 'key man' system, and to create a fairer way to select people for federal jury source lists, the United States Congress in 1968 enacted the *United States Jury Selection and Service Act* (JSSA). The stated policy of the JSSA is that "all litigants in federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community."<sup>102</sup> Under the JSSA, jurors for trials in federal courts are selected from voters lists, though the courts are given the discretion to supplement this source with others if it is determined that the voters list is unrepresentative. This legislation was an important step forward in promoting jury representativeness in the United States,. However, the JSSA applies only to the composition of jury source lists for federal courts, not state courts. The 'key man' system has not been declared unconstitutional, and it appears as though it is still used in some states to select the juries for trials before state courts.<sup>103</sup> Moreover, there is evidence that African-American underrepresentation on voters lists and the unavailability of residence lists from predominantly African-American districts means that African-Americans continue to be under-represented in federal jury trials.<sup>104</sup>

114. In Canada, as I noted above, the importance of a representative jury was not recognized as a constitutional principle until after the enactment of the *Charter* in 1982. However, in its 1980 working paper described at paragraph 76 above, the Law Reform Commission of Canada stated that "the functions assigned to the jury presuppose that jurors are selected at random from a fair cross-section of the community."<sup>105</sup> Consequently, "if a representative jury is to be empanelled, the categories of people who are disqualified from jury service must be kept at a minimum."<sup>106</sup> The Law Reform Commission recommended the following as the only reasonable disqualifications from jury service: not having Canadian citizenship, not having attained the age 18 years or over, not an ordinary resident in the judicial district, lack of fluency in the language of the accused, a mental or physical disability, conviction of a criminal offence, and certain occupational disqualifications.<sup>107</sup>

<sup>96</sup> *Duncan v. Louisiana* (1968), 391 U.S. 145.

<sup>97</sup> *Batson v. Kentucky* (1986), 476 U.S. 79.

<sup>98</sup> Valerie Hans and Neil Vidmar, *Judging the Jury* (Perseus Publishing: United States, 1986) at 58.

<sup>99</sup> Hiroshi Fukurai, Critical Evaluations of Hispanic Participation on the Grand Jury: Key-Man Selection, Jurymanering, Language and Representativeness Quotas" (2001) 5 Texas Hispanic Journal of Law and Policy 7 at 19.

<sup>100</sup> *United States v. Green* (2005), 389 F. Supp. 2d 29 at para. 23.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> Coramae Richey Mann, *Unequal Justice: A Question of Color* (Indianapolis: Indian University Press, 1993) at 172.

<sup>104</sup> See Judge Nancy Gertner, "12 Angry Men (And Women) in Federal Court" (2007) 82 Chicago-Kent L.R. 613; *United States v. Green*, 389 F. Supp. 2d 29; Hiroshi Fukurai, Edgar W. Butler and Richard Krooth, "Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection" (1991) 22 Journal of Black Studies 196.

<sup>105</sup> Law Reform Commission of Canada, *Working Paper 27: The Jury in Criminal Trials* by Chairman Francis Muldoon (Ottawa: Minister of Supply and Services Canada, 1980) at 37.

<sup>106</sup> *Ibid.*, at 40.

<sup>107</sup> *Ibid.*, 40-43.

115. In its 1991 *R. v. Sherratt* decision, the Supreme Court of Canada recognized the requirement of a representative jury as a constitutional principle. In her reasons for the majority in that case, Madam Justice L'Heureux-Dube linked the principles of representativeness and impartiality to the s. 11(f) *Charter* right to be tried by a jury and the s. 11(d) *Charter* right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. As she stated,

[T]he *Charter* right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform many of the functions that make its existence desirable in the first place.<sup>108</sup>

116. In addition to protecting the rights of the accused, the representativeness of juries has broader implications for society's perception of the criminal justice system. Impartial and representative juries play an important function in maintaining public confidence in the legal system. The public is more likely to perceive trials, and by extension the legal system as a whole, as being fair if prospective jurors are representative of the wider community from which they are drawn. Conversely, the wholesale exclusion of particular groups from the jury pool risks undermining public acceptance of the fairness of the criminal justice system. A jury cannot act as the conscience of the community unless it is viewed favorably by the society that it serves.

## 2. ONTARIO CASE LAW ON REPRESENTATIVENESS

117. As I discussed above in Part II,A, the Independent Review arose in large part from a series of recent cases – *Pierre v. McRae* and the *Kokopenace* and *Spiers* appeals – dealing with the representativeness of jury rolls as they relate to members of First Nation communities. In this section, I briefly discuss some other Ontario cases that deal with the issue of representativeness. These cases have arisen in two different contexts: the preparation of jury rolls and the selection of individuals to serve on the jury.

### (A) PREPARATION OF JURY ROLLS

118. In *R. v. Church of Scientology et al.* (1997), the Ontario Court of Appeal refused to find that limiting prospective jurors to Canadian citizens results in an unrepresentative jury.<sup>109</sup> In that case, the accused, who was a non-citizen convicted of various offences, sought to have a mistrial declared on the basis that the exclusion of non-citizens from jury rolls resulted in a jury that was unrepresentative. The trial judge agreed that the exclusion of non-citizens resulted in an unrepresentative jury roll, but the Court of Appeal overturned this decision. The Court acknowledged that a representative jury is important to ensure that certain viewpoints and beliefs are not systematically excluded from the jury pool. However, the Court found that non-citizens do not share any common characteristics that are relevant to the underlying reason for ensuring that jury rolls are representative.

119. Similarly, in *R v. Laws* (1998), the Ontario Court of Appeal found that the citizenship requirement for inclusion on the jury roll did not result in unrepresentative juries by precluding large numbers of black permanent residents who are not citizens from potential jury service.<sup>110</sup> The accused in this case was black and was charged with illegally smuggling individuals into Canada and the United States. He argued that a mistrial should be declared because the citizenship requirement for jury service resulted in large numbers of black permanent residents being excluded, raising the possibility that the jury roll was unrepresentative. The Court of Appeal disagreed; it found that the defendant could not establish that marginally increasing

<sup>108</sup> *R. v. Sherratt*, [1991] 1 S.C.R. 509 at para. 35.

<sup>109</sup> *R. v. Church of Scientology of Toronto*, 33 O.R. (3d) 65 (C.A.).

<sup>110</sup> *R. v. Laws* (1998), 41 O.R. (3d) 499 (C.A.).



the number of black people on jury rolls by eliminating the citizenship requirement for jury service would result in a material increase in the possibility of a black individual being selected to serve on the jury for a black person charged with an offence. However, this holding does not preclude the opposite finding in another case with substantially different demographics.

120. In *R. v. Nahdee* (1993), the Ontario Court of Justice declared a mistrial after it became clear that the sheriff of Lambton County had failed to make sufficient efforts to ensure that First Nations peoples were represented on jury rolls.<sup>111</sup> The defendant was charged with attempted murder, but subsequently sought a mistrial on the basis that the sheriff failed to secure the names of First Nations individuals for possible inclusion on jury rolls. The sheriff had contacted band leadership on First Nations reserves in his district in order to secure the names of the reserve's inhabitants for jury questionnaire mailing. However, the band leadership failed to reply to the sheriff's request, and the sheriff took no further actions to gather the names of reserve residents. The Court found that the sheriff failed in his duty under the *Juries Act* to actively seek out the names of First Nations individuals living on reserves for possible inclusion on the jury rolls. His failure to do so resulted in an unrepresentative jury roll, which warranted the finding of a mistrial.

121. In a 1994 follow-up trial involving the defendant from *R. v. Nahdee*,<sup>112</sup> the defendant was again convicted of attempted murder, but sought to have the conviction set aside on the basis that the jury roll was unrepresentative. The Ontario Court of Justice found that in 1994, the sheriff had made greater efforts to place the names of First Nations individuals in Lambton County on the jury roll by sending out and receiving responses from a larger number of jury questionnaires. As a result, the names of First Nations people living on reserves were inscribed on the jury roll, and there was a possibility that First Nations individuals would be chosen to serve on jury panels.

122. *R. v. Ransley* (1993) followed on the heels of the defendant's success in having a mistrial declared in *R. v. Nahdee*.<sup>113</sup> In *Ransley*, the defendant challenged the jury panel composed for his trial alleging that the jury roll was unrepresentative because the sheriff did not follow a specified procedure for adding First Nations individuals to the roll and also sent a disproportionately large number of questionnaires to the reserves in his jurisdiction because of the historically low response rates. The Ontario Court of Justice denied the defendant's challenge to the composition of the jury panel. The Court found that the process followed by the sheriff, while imperfect, represented a good faith attempt to secure the representation of First Nations peoples on the jury roll.

## **(B) SELECTION OF THE JURY PANEL**

123. As already noted, the foundational case elevating the principle of a representative jury to a constitutional imperative was the Supreme Court's decision in *Sherratt*.<sup>114</sup> In that case, the accused sought to have all prospective jurors dismissed on the basis that they were not impartial as between the Crown and the accused. The accused was charged with murder, and considerable media coverage surrounded the search for the deceased's body ten months before the trial. The trial judge denied the defence's request. However, he instructed all prospective jurors that they could not serve on the jury if they had seen, heard, or read anything that might render them not impartial as between the Crown and the accused. The Supreme Court of Canada upheld the trial judge's decision but, as referred to in paragraph 115 above, made important statements about the constitutional requirement for juries to be impartial and representative.

<sup>111</sup> *R v. Nahdee*, [1994] 2 C.N.L.R. 158 (O.N.C.J.).

<sup>112</sup> *Ibid.*

<sup>113</sup> *R. v. Ransley*, [1993] O.J. No. 2828 (O.N.C.J.).

<sup>114</sup> *Sherratt*, *supra* note 108.

124. In *R. v. Bain* (1992), the Supreme Court of Canada found that section 634 of the *Criminal Code* was unconstitutional because it allowed the Crown to challenge, without cause, four times more jurors than the defence, as the Crown's ability to stand-aside 48 potential jurors far outstripped the defence's right to peremptorily challenge them.<sup>115</sup> The Court held that this could result in a jury that was perceived by society as partial towards the Crown, thereby tarring the entire trial with a taint of unfairness.

125. In *R. v. Smoke* (1983), the Ontario High Court of Justice found that the absence from the jury of First Nations individuals living on reserves in the jurisdiction where the crime took place did not constitute a violation of the defendant's *Charter* rights.<sup>116</sup> The defendant was charged with various counts of sexual assault, and all of the alleged offences took place on the reserve where he resided. He argued that he had a right to be tried on the reserve where he resided with a jury composed entirely of its residents. The Court disagreed; it found, that although there were no residents from reserves on the jury roll, First Nations individuals living off reserve were included. The Court found that First Nations individuals were as likely as non-First Nations individuals to be called to serve on a jury. The Court acknowledged that the presence of First Nations individuals living off reserve on the jury roll was different from having individuals who live on reserves on the jury roll; however, it did not believe that this distinction was serious enough to warrant providing the defendant with a remedy.

126. In *R. v. Butler* (1984), the British Columbia Court of Appeal found that a sheriff's policy of intentionally excluding members of First Nations from jury panels resulted in an unrepresentative jury that warranted granting the defendant a mistrial.<sup>117</sup> The Court noted that it is possible for a jury panel to contain no First Nations individuals. However, the "essential wrong" in this case was a deliberate policy on the part of the sheriff to exclude First Nations individuals altogether.<sup>118</sup>

127. In *Fiddler v. the Queen* (1994), the defendant was charged with sexual assault and, before the trial began, argued that he had a constitutional right to be tried by a jury of his cultural peers to be randomly selection from the district where he resided.<sup>119</sup> The then Ontario Court of Justice disagreed. While the Court recognized the importance of having people who share the defendant's cultural affinity on the jury rolls, it decided that the cultural affinity of the accused cannot predominate, since such a narrow approach ignores the perspective of the complainant and ignores entirely the interests of the public. Indeed, a jury composed solely of members of the accused's community would run counter to the value of maintaining a representative jury roll.

128. In *R. v. A.F.* (1993), the then Ontario Court of Justice found that holding a trial by jury outside of the defendant's community did not infringe his *Charter* rights.<sup>120</sup> The defendant, a resident of the Sandy Lake reserve, was accused of various sexual offences and elected a trial by jury. However, trials by jury were not available in Sandy Lake, and instead the trial was to be held in Kenora. The defendant argued that holding the trial in Kenora violated his *Charter* rights, since the jury would not be composed of members of his community. The Court disagreed; it wrote that for the purposes of jury selection, the notion of 'community' must be defined broadly if the jury is to satisfy its role as a democratic institution. A jury composed entirely of members of the defendant's family and kin would run counter to the broader definition of community. Moreover, the *Charter* does not provide a right to be tried in a particular location or to be tried exclusively by the members of a particular group.

<sup>115</sup> *R. v. Bain*, [1992] 1 S.C.R. 91.

<sup>116</sup> *R. v. Smoke*, [1983] O.J. No. 563, (H.C.J.).

<sup>117</sup> *R. v. Butler*, [1984] B.C.J. No. 1915 (B.C.C.A.).

<sup>118</sup> *Ibid.*

<sup>119</sup> *Fiddler v. the Queen* (1994), 22 C.R.R. (2d) 82 (O.N.C.J.).

<sup>120</sup> *R. v. A.F.*, [1994] O.J. No. 1392 (O.N.C.J.).

129. Finally, *R. v. Wareham (#2)* (2012) is, at the time of writing, the most recent judicial decision dealing with the issue of Aboriginal underrepresentation on jury rolls.<sup>121</sup> The defendant in *Wareham* was charged with second degree murder. His trial had originally been set for 2011, but following the Ontario Court of Appeal's decision in *Pierre v. McRae*, he successfully challenged his jury panel on the basis that it was not representative. In his 2012 trial, he once again attempted to challenge his jury panel on the basis that it was unrepresentative. The Superior Court denied his challenge. The Court found that, while the procedure in place for securing the representation of First Nations peoples on jury rolls was imperfect, good faith efforts were made to obtain the names of First Nations individuals living on reserve for inclusion on the jury roll. These efforts included contacting band chiefs and mailing jury questionnaires to large numbers of people living on reserve.

130. Certain general principles emerge from these cases. The principle of representativeness requires that jurors be selected at random from a pool whose composition is representative of Canadian society as a whole. In order to be representative, no group of Canadians can be systematically excluded. However, as I have stated above, no one has the right to have individuals from a particular group on their jury panel, or to be tried exclusively by members of a group to which they belong. Finally, illegality in the process for composing the jury, like the process for swearing in the jury, suffices to have a trial verdict set aside.

131. Having said all this with respect to the case law on representativeness, from a policy standpoint, I believe Ontario could enact procedures and approaches that go beyond the minimum legal standards that have been set by the jurisprudence, so long as what is proposed does not run afoul of the basic legal ingredients for having an impartial and representative jury.

## E. THE REPRESENTATION OF FIRST NATIONS PEOPLES ON ONTARIO JURIES

### 1. INTRODUCTION

132. As the cases discussed above make clear, the issue of underrepresentation of members of First Nations communities on Ontario's jury roll is a serious and persistent problem. The statistics that have emerged from the court cases about underrepresentation of First Nations communities in the large northern judicial districts of Ontario are particularly troubling.

133. In the judicial district of Kenora, for example, which makes up about one-third of Ontario's land mass, it is estimated that approximately 30 to 36 per cent of the population live "on reserve" – in communities designated as reserves under the *Indian Act* or as "Indian Settlements" (non-reserve Crown land on which a community of Aboriginal persons resides more or less permanently)<sup>122</sup>. But, as described further below, these on-reserve residents typically make up less than ten percent of the Kenora jury roll. Similarly, in the judicial district of Thunder Bay, on-reserve residents in 2011 made up approximately five percent of the population but accounted for only 1.3 percent of the jury roll.<sup>123</sup>

134. My task in this Review is to provide recommendations as to how we can begin to deal with this problem, which – as I have emphasized – is deep and systemic. But to provide the proper context to my recommendations, it is important first to understand the steps that have already been taken by provincial officials to attempt to create a jury roll that is properly representative of the members of First Nations

<sup>121</sup> *R. v. Wareham (#2)*, [2012] O.J. No. 767 (S.C.J.).

<sup>122</sup> See paragraphs 53 to 55, and the tables of demographic data contained therein, of the Affidavit of Amber Khan (January 21, 2011) filed in *R. v. Kokopenace*.

<sup>123</sup> "Ruling by Dr. Eden on motion regarding jury selection," *Inquest concerning the death of Reggie Bushie*, (September 9, 2011) at para. 18.



communities. I do that in this section by describing the *Juries Act* obligation of court officials to include on-reserve residents on Ontario's jury roll, the record as to the steps court officials have taken to attempt to fulfill that obligation, and the results of those efforts to date.

## 2. JURIES ACT OBLIGATION TO INCLUDE ON-RESERVE RESIDENTS ON ONTARIO'S JURY ROLL

135. As described at paragraph 99 above, the *Juries Act* specifies that the primary source of data for creating Ontario's jury roll is the most recent municipal enumeration undertaken pursuant to the *Assessment Act*. But municipal enumeration does not capture residents of reserves designated under the *Indian Act*. The *Juries Act* therefore prescribes a separate process intended to provide for the proportionate inclusion of on-reserve residents in the jury roll. Section 6(8) of the *Juries Act* states:

6(8) In the selecting of persons for entry in the jury roll in a county or district in which an Indian reserve is situate, the sheriff shall select names of eligible persons inhabiting the reserve in the same manner as if the reserve were a municipality and, for the purpose, the sheriff may obtain the names of inhabitants of the reserve from any record available.<sup>124</sup>

136. The sheriff's obligation "to obtain the names of inhabitants of the reserve from any record available" is in fact carried out by various provincial officials who have either been assigned the powers of the sheriff or who act on the instruction of the holder of such assigned powers.<sup>125</sup> Responsibility for fulfilling the obligations of section 6(8) is currently divided among:

- (a) local judicial district or county court staff, who obtain the names of on-reserve inhabitants, select the individuals to receive questionnaires, and prepare and mail the questionnaires to on-reserve inhabitants;
- (b) the Provincial Jury Centre, which receives and reviews the questionnaires returned and enters the eligible names in the jury roll; and
- (c) the Director of Court Operations for the West Region, who carries out the sheriff's responsibility to certify each jury roll to be the proper roll prepared as the law directs.<sup>126</sup>

## 3. PRACTICE OF COURT OFFICIALS PRIOR TO 2001

137. The requirements currently found in section 6(8) of the *Juries Act* were first adopted in 1973, but it is not clear what records were relied on by Ontario officials at that time to fulfill those requirements. It appears that from at least the early 1990s on, Ontario officials began to rely substantially on lists maintained by Indian and Northern Affairs Canada (INAC) of persons with registered Indian status affiliated with each First Nation in Ontario.<sup>127</sup> These lists were obtained each year by the Provincial Jury Centre by way of a request to INAC under the federal *Access to Information Act* pursuant to a 1983 Ontario-Canada agreement allowing access to, and the use and disclosure of, personal information under the control of a federal government institution to Ontario for the purpose of administering or enforcing any law or carrying out a lawful investigation.<sup>128</sup> Once obtained, the lists were distributed to local court offices, where they were used to fulfill the requirements of section 6(8), if the local court staff were unable to obtain a list directly from a First Nation, which was often the case.

<sup>124</sup> *Juries Act*, R.S.O. 1990, c. J. 3., s. 6(8).

<sup>125</sup> See section 73(2) of the *Courts of Justice Act*, R.S.O. 1990, c. 43, as amended, which provides for any power or duty of the sheriff to be exercised or performed by a person to whom the power or duty has been assigned by the Deputy Attorney General or a person designated by the Deputy Attorney General.

<sup>126</sup> *Juries Act*, *supra* note 124 at s. 9. The Transcript of the cross-examination of Shaun Joy filed in *R. v. Kokopenace*, at 25-27.

<sup>127</sup> See paragraph 13 of the Affidavit of Sheila Bristo dated December 2, 2011, filed in *R. v. Kokopenace*.

<sup>128</sup> *Access to Information Act*, R.S.C. 1985, c. A-1. Agreement between Canada and Ontario dated July 20, 1983, filed as Exhibit 25 to the transcript of the cross-examination of Shaun Joy filed in *R. v. Kokopenace*.

138. It appears that in the 1990s, provincial officials received more completed jury questionnaires from on-reserve residents than is the case today. In his 1994 decision in *R. v. Fiddler*, for example, Mr. Justice Stach stated that the return rate for on-reserve residents was approximately 33 percent, far higher than the return rates in the Kenora judicial district over the last several years, which have been less than ten percent.<sup>129</sup>

139. From at least the mid-1990s on, the Ministry of the Attorney General's Court Services Division circulated to its staff a directive respecting the performance of the sheriff's duties under section 6(8).<sup>130</sup> This directive was distributed annually by the Provincial Jury Centre to local court staff as part of an annual communications package sent out to prompt the commencement of the section 6(8) work. The directive instructed local court staff to:

- (a) ascertain, check, and confirm the reserves located in the county or district for which they were responsible;
- (b) attempt to obtain the band electoral list, or any other accurate list of residents, by writing letters, telephoning, or visiting the reserves in the area for which they were responsible;
- (c) calculate the number of on-reserve questionnaires to be sent, using a prescribed formula;
- (d) perform a random selection of the required number of names from "the best possible list", and prepare and mail the questionnaires to these persons; and
- (e) provide interim and final reports to the Provincial Jury Centre at various points during this process.

140. That directive has now been replaced by instructions contained in a Jury Manual prepared by the Court Services Division, and is available to local court officials. Chapter 7 of the Jury Manual provides directions to local court officials as to how to comply with the requirements of section 6(8), restating and expanding on the instructions that had been provided in the directive.<sup>131</sup>

## 4. PRACTICE OF COURT OFFICIALS FROM 2001 ON

141. In 2001, INAC advised the Ministry of the Attorney General's Court Services Division that it was discontinuing its previous practice of providing lists to the Ministry. In its correspondence with the Ministry, INAC noted that federal privacy policies and practices regarding the release of this kind of personal information pursuant to the *Privacy Act* had changed since INAC initially began providing the lists.<sup>132</sup> INAC stated that "[d]ue to the sensitive nature and variability of the information under INAC's control, we have determined that this information cannot be released to you at this time."<sup>133</sup> INAC also noted in the letter that Ontario was the only province requesting this information from INAC for the purpose specified.<sup>134</sup>

142. Following 2001, Ontario officials continued to rely on the 2000 INAC lists, despite the fact that they began to become out-dated, as well as any other lists they were able to obtain by writing to or otherwise contacting individual First Nations communities. In the late 2000s, it appears that local court officials learned for the first time that the response rates from questionnaires mailed to the on-reserve population were very low. For example, the court official responsible for carrying out the sheriff's duties in the Kenora

<sup>129</sup> *R. v. Fiddler* (1994), 22 C.R.R. (2d) 82 at para. 101 (O.N.C.J.).

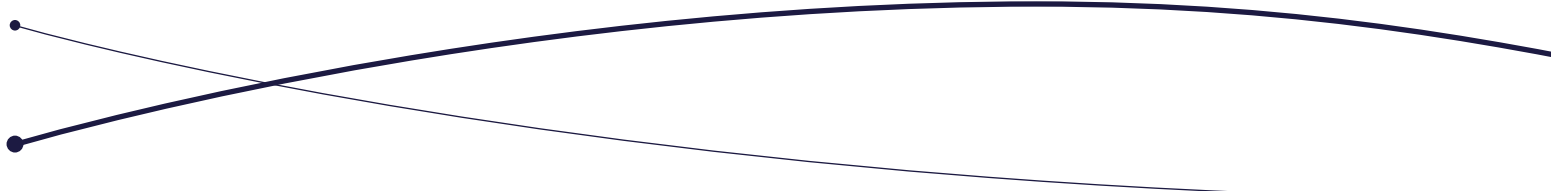
<sup>130</sup> The 1996 version of this directive, which was filed in *R. v. Kokopenace*, is a memorandum dated June 25, 1996 from the Director of the Program Development Branch of the Ministry of the Attorney General Court Services Division. According to the evidence filed in *Kokopenace*, I understand that versions of this directive were distributed annually.

<sup>131</sup> The Affidavit of Sheila Bristo (December 2, 2011), filed in *R. v. Kokopenace*, at para. 17.

<sup>132</sup> *Privacy Act*, R.S.C. 1985, c. P-21.

<sup>133</sup> Letter from Diane Leroux, Coordinator, Access to Information and Privacy, INAC to Liz Boyce, Court Administration Division, Ministry of the Attorney General of Ontario (September 24, 2001).

<sup>134</sup> *Ibid.*





judicial district learned in 2007 that the rate of eligible returns (i.e. the number of returned questionnaires from individuals eligible for the jury roll) for questionnaires sent to on-reserve residents in 2006 (for the 2007 jury roll) was 7.6 percent compared to a rate of 56 percent for off-reserve residents.<sup>135</sup>

143. Upon learning about these dismal rates of return, Kenora district court officials began taking additional steps to increase on-reserve resident representation. During the summer of 2007, Kenora court officials, including a court interpreter and Aboriginal liaison official for Ontario's north west region, travelled to 15 First Nations, meeting with community leaders, discussing issues relating to Aboriginal participation in the jury system and requesting updated Band Lists. In addition, Mr. Justice Stach directed that the number of questionnaires to be sent to the on-reserve population for the 2008 roll be increased substantially. Kenora court officials also took additional steps to encourage on-reserve resident participation in juries, including arranging for advance payment of travel, accommodation, and meals expenses and calling jury panels to appear on Tuesdays, rather than Monday, to enable potential jurors to travel to Kenora on Monday, rather than travel on Friday and stay the entire weekend waiting for the Monday appearance. Although the data maintained by the Provincial Jury Centre suggests that increasing the number of mailings to on-reserve communities has the effect of increasing the number of eligible on-reserve residents on the jury roll,<sup>136</sup> the response rates for eligible on-reserve questionnaires have remained very low – 5.7 percent for the 2008 jury roll,<sup>137</sup> 5.7 percent for 2009, 6.3 percent for 2010 and 6.3 per cent for 2011.<sup>138</sup>

144. There have been similar issues with underrepresentation of First Nations peoples on the Thunder Bay judicial district jury roll. In 2011, there were two separate findings that the jury roll for the Thunder Bay district was unrepresentative – both made following the Court of Appeal's ruling in *Pierre v. McRae*.

145. In the first case, *R. v. Wareham (#1)*, Madam Justice Pierce determined that the 2011 jury panel selection was not representative. The evidence she heard was that: court officials would send a fax and letter to each First Nations Chief requesting an updated band electoral list, followed by a telephone call; after further efforts to obtain the lists, Court Services Division would then wait to see which First Nations provided the information; only two of the 15 First Nations communities in the Thunder Bay judicial district agreed to provide the information; the lists relied on were generally old, some dating back to 2000; and court officials were not aware of the response rates from on-reserve individuals, discussed above at paragraph 142.

146. In the second case, a coroner's inquest into the death of Reggie Bushie, the Coroner Dr. Eden also held that the 2011 jury roll was not representative. He noted that residents of First Nations reserves represented five percent of the population in the Judicial District of Thunder Bay but accounted for only 1.3 percent of the jury roll – a result he described as a "serious deficiency".<sup>139</sup> On the basis of these results and a number of "deficiencies" he identified in the processes followed by local court officials, he concluded that the sheriff's duty of "diligence", set out in the *Nahdee* test, had not been met, and the 2011 jury roll was therefore not representative.<sup>140</sup>

147. In 2012, the *R. v. Wareham (#2)* case, discussed above at paragraph 129, came back before the court, and the accused once again challenged the representativeness of the jury roll – the 2012 roll this time. The court heard more evidence than had been heard in *R. v. Wareham (#1)*, including evidence with respect to additional efforts that had been made and procedures that had been changed to address the problems in

<sup>135</sup> Affidavit of Laura Loohuizen, filed in *R. v. Kokopenace* at paras. 82-83.

<sup>136</sup> For example, when the number of questionnaires sent to on-reserve residents was increased from 600 for compiling the 2008 jury roll to 810 for compiling the 2009 jury roll, the number of eligible on-reserve residents who replied and were able to be added to the jury roll increased from 34 to 64 persons. Correspondingly, when the number of questionnaires sent to on-reserve residents was decreased to 652 in 2010 and 684 in 2011, the number of eligible on-reserve residents added to the jury roll decreased to 41 and 43 persons respectively. See Exhibit C of the Affidavit of Shaun Joy (July 19, 2011) filed in *R. v. Kokopenace*.

<sup>137</sup> Affidavit of Laura Loohuizen, *supra* note 135 at paras. 103-104. See also: Exhibit 54, filed in *R. v. Kokopenace*.

<sup>138</sup> Exhibit C of the Affidavit of Shaun Joy (July 19, 2011) filed in *R. v. Kokopenace*.

<sup>139</sup> *Inquest concerning the death of Reggie Bushie; Ruling by Dr. Eden on motion regarding jury selection*, September 9, 2011, at para. 18.

<sup>140</sup> *Ibid.*, at paras. 25-26.

the 2011 roll. Mr. Justice Platana concluded that, as a result of these additional efforts, the sheriff's office had satisfied the requirements of section 6(8) of the *Juries Act*, including that the sheriff exercise due diligence, resourcefulness, ingenuity and perhaps persuasion, rather than passively acquiescing to non-response or chronically ignored requests. As he stated:

I do accept that, on the facts before me, the 2012 Thunder Bay jury roll was compiled in a manner that was representative of the community to the extent currently available. The facts are sufficient to establish that the sheriff did exercise diligence beyond what was done in the preparation of the 2011 and previous jury panels. Beyond the changes to the formal procedure, resourcefulness and ingenuity is demonstrated by the inclusion of a Native Court Worker to assist in obtaining information. Local elders were contacted for assistance. While *Bushie* describes the sheriff's duty as including "possibly persuasion", I also take into account the necessity for cultural sensitivity. When direct refusals to provide lists have been given by the band chiefs and councils, the leaders and decision-makers of their respective communities, and those offers to meet have not been accepted, I have no evidence before me to determine what other "persuasion" might be effective. Their attempts at including First Nations peoples living on-reserve demonstrate a reasonable effort to create a jury roll that is representative of the community.<sup>141</sup>

148. While these efforts were sufficient to satisfy Mr. Justice Platana that the sheriff's office had satisfied the requirements of section 6(8), the evidence of court officials in *R. v. Waerham (#2)* was that the response rate for eligible on-reserve questionnaires remained very low at 5.6 per cent.<sup>142</sup>

## F. EXPERIENCE IN OTHER JURISDICTIONS

149. In accordance with paragraph 4 of the Order-in-Council, I have as part of my review considered the law and practice in other jurisdictions to assess what lessons we can learn from them. Underrepresentation of Aboriginal peoples on juries is by no means exclusively an Ontarian or Canadian issue. Rather, this issue exists in various jurisdictions that rely on juries and that have sizeable Aboriginal populations, including other Canadian provinces, New Zealand, Australia, and the United States. In this section, I discuss the ways individuals are selected for jury rolls in other Canadian provinces, as well as Australia, New Zealand and some American states, and how issues of underrepresentation are dealt with in those jurisdictions.

### 1. EXPERIENCE IN OTHER CANADIAN PROVINCES

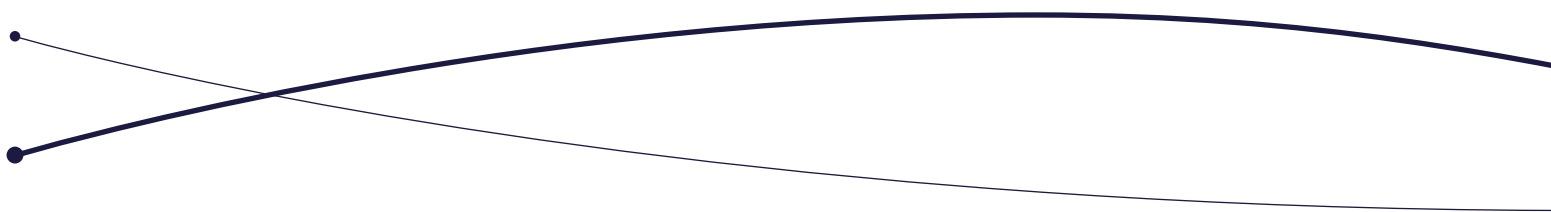
150. The underrepresentation of individuals from First Nations communities on jury rolls is a serious concern in a number of provinces across Canada. As described below, the issue was dealt with in Manitoba's Aboriginal Justice Inquiry, and has also received recent attention from the British Columbia Government. In this section, I discuss the experiences of other provinces with respect to the issue of underrepresentation on jury rolls, as well as measures undertaken to remedy the problem. I will also briefly explain what source lists are used in other provinces to collect the names of prospective jurors.

#### (A) MANITOBA

151. Manitoba has had extensive experience with the issue of the underrepresentation of First Nations peoples on juries, and appears to be the only other province in Canada to have conducted a major review of this issue.

<sup>141</sup> *R. v. Wareham (#2)*, [2012] O.J. No. 767 at para. 54 (S.C.J.).

<sup>142</sup> *Ibid.*, at para. 23.



152. In April 1988, the Manitoba government created the Public Inquiry into the Administration of Justice and Aboriginal People in response to two incidents: a 17-year delay in bringing a 1971 murder on a First Nation reserve to trial, and the 1988 death of the executive director of a tribal council at the hands of a police officer, who was exonerated the next day. The Report of the Inquiry did not mince words; it opened by stating that “the justice system has failed Manitoba’s Aboriginal people on a massive scale.”<sup>143</sup> Because the scope of the Inquiry exceeds that of this Independent Review, I will discuss only those parts of the report that addresses the relationship between First Nations in the province and juries.

153. Historically, the jury roll in Manitoba was composed using voting lists. However, members of First Nations and Métis, were denied the vote in Manitoba between 1886 and 1952, and consequently were excluded from potential jury service. While First Nations individuals were granted the right to vote in 1952, their participation on juries did not improve significantly since First Nations officials, unlike mayors, were not required to submit the names of potential jurors to the County Court Judge. After 1971, First Nations officials were required to submit names drawn from their electoral lists.

154. In 1983, the province began using computerized records from the Manitoba Health Services Commission to compose jury lists. The Inquiry found that the use of provincial health records was a preferable source for choosing jurors, because it included First Nations individuals. The Inquiry stated that it was only after 1983 “that Aboriginal people began to be properly represented on the lists of potential jurors”.<sup>144</sup> However, the Inquiry identified a number of logistical problems that remained and contributed to ongoing underrepresentation.

155. The Inquiry found that First Nations individuals were excluded at two stages of the jury composition process: the summoning of prospective jurors and the pre-trial jury-selection process. The Inquiry concluded that the summoning procedure works against Aboriginal people in a number of ways: summons are sent by mail, but individuals living on reserve often do not have access to regular mail service; individuals living on reserve are less likely to have telephone service at home, and therefore following up on a summons is difficult; and First Nations individuals living in urban centres are more likely to be renters, and therefore accurate records of their current addresses may not exist. Moreover, exemptions are often granted to First Nations individuals on the basis that the costs of travelling to the court and serving on the jury exceeds their means, and many First Nations individuals cannot speak English or French.<sup>145</sup> At the jury selection stage, the Inquiry found that “it is common practice for some Crown attorneys and defence counsel to exclude Aboriginal jurors through the use of stand-asides and peremptory challenges.”<sup>146</sup> The examples they provide are compelling. In the Helen Betty Osborne case in The Pas, the jury had no Aboriginal members, in spite of the fact that it was in an area of Manitoba where Aboriginal people comprise over 50% of the population.<sup>147</sup> All six Aboriginal people called forward were the subjects of peremptory challenges from the defence. Similarly, on one day of the Thompson assizes, 35 of 41 Aboriginal people called to serve on three juries were rejected through peremptory challenges and stand-asides. “In one case, the Crown rejected 16 Aboriginal jurors; in another, the defence rejected two and the Crown rejected 10; in the third and final case, the defence accepted all the proposed Aboriginal jurors, while the Crown rejected nine. Two jurors were rejected twice.”<sup>148</sup>

<sup>143</sup> Public Inquiry Into the Administration of Justice and Aboriginal People, *Report on Aboriginal Justice Inquiry of Manitoba*, Vol. 1 by A.C. Hamilton & C.M. Sinclair. (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991) online: The Aboriginal Justice Implementation Commission <<http://www.ajic.mb.ca/volume1/toc.html>> at chapter 1.

<sup>144</sup> *Ibid.*, at chapter 9.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

156. The Law Reform Commission of Canada described the importance of peremptory challenges in the following manner:

the peremptory challenge has been attacked and praised. Its importance lies in the fact that justice must be seen to be done. The peremptory challenge is one tool by which the accused can feel that he or she has some minimal control over the make up of the jury and can eliminate persons for whatever reason, no matter how illogical or irrational, he or she does not wish to try the case.<sup>149</sup>

However, the Inquiry found that this power to exclude potential jurors for ‘illogical or irrational’ reasons has undesirable effects on the racial make-up of jury panels.<sup>150</sup>

157. To address the exclusion of First Nations individuals at the summons stage, the Inquiry recommended that where the sheriff grants an exemption from jury service (for instance on the basis that the person called cannot speak the language of the trial), that person must be replaced by someone from the same community. It also recommended that summonses be enforced, even where enough people have been found for the jury panel (given the lack of access to regular mail, First Nations individuals who do respond to a summons have often done so well after others with regular access to mail). With respect to the exclusion of First Nations individuals at the jury-selection stage, the Inquiry recommended that: peremptory challenges and stand-asides be eliminated altogether; that jurors be drawn from within 40 kilometers of the community where the trial is to be held; that in the event jurors need to be drawn from elsewhere, they should be selected from a community as similar as possible demographically and culturally to the community where the offence took place; and that the *Juries Act* should be amended to provide translation services for First Nations jurors who do not speak English or French but who are otherwise qualified to serve.<sup>151</sup>

158. It should be noted that, in response to the Supreme Court’s decision in *R v. Bain*, Parliament in 1992 amended section 634 of the *Criminal Code* to eliminate the practice of stand-asides by the Crown, thereby remedying the asymmetry in power between the defence’s right to peremptorily challenge and the Crown’s right to stand-aside potential jurors.<sup>152</sup> Parliament replaced stand-asides with equal endowments of peremptory challenges for the Crown and the defence.<sup>153</sup> But this amendment does not change the underlying ability to discriminate in jury selection processes. Otherwise left unchecked, the amendment merely equalizes the discriminatory power inherent to peremptory challenges.

## **(B) BRITISH COLUMBIA**

159. The British Columbia *Jury Act* gives the sheriff broad discretion in creating the jury roll for the province. Section 2 of the Act establishes the principle that “a person has the right and duty to serve as a juror unless disqualified or exempted under this Act”, while section 8 states that “[h]aving regard for the principle in section 2, the sheriff may determine the procedures the sheriff considers appropriate for the selection of jurors.”<sup>154</sup> In practice, the sheriff uses provincial voters’ lists to select prospective jurors,<sup>155</sup> but there are concerns that the list does not properly capture individuals living in First Nations communities.

160. In 2011, following Ontario judicial decisions such as the Court of Appeal’s decision in *Pierre v. McRae*, the British Columbia Civil Liberties Association (BCCLA) began an investigation of the practices followed

<sup>149</sup> Law Reform Commission of Canada, *Working Paper 27: The Jury in Criminal Trials* by Chairman Francis Muldoon (Ottawa: Minister of Supply and Services Canada, 1980) at 54.

<sup>150</sup> *Report on Aboriginal Justice Inquiry of Manitoba*, *supra* note 143 at chapter 9.

<sup>151</sup> *Ibid.*

<sup>152</sup> *R v. Bain*, [1992] 1 S.C.R. 91.

<sup>153</sup> *Criminal Code*, R.S.C., 1985, c. C-46, s.634 as am. by *An Act to Amend the Criminal Code*, S.C. 1992, c.41, s.2.

<sup>154</sup> *Jury Act*, R.S.B.C. 1996 Chapter 242, ss. 2 and 8.

<sup>155</sup> See *Jury Duty – Our Justice System Depends On It*, online: British Columbia Ministry of Justice <[http://www.ag.gov.bc.ca/courts/jury\\_duty/index.htm](http://www.ag.gov.bc.ca/courts/jury_duty/index.htm)>.



by the sheriff's office in British Columbia with respect to First Nations. In June 2011, the BCCLA wrote to British Columbia's Attorney General, stating that, as a result of its investigation, the BCCLA had become concerned that juries in British Columbia might suffer from similar underrepresentation of First Nations peoples on jury rolls. In its letter, the BCCLA stated that it did not appear the First Nations communities were being consistently included on the provincial voters list or directly contacted by Sheriffs' Offices.

161. British Columbia's Attorney General responded to the BCCLA letter in July 2011. In his response, he stated that in order to improve the sheriffs' database, a senior Court Services official had written to all Band leaders in the province requesting their lists of persons residing on reserves. He also stated that the database that British Columbia sheriffs obtain from Elections BC is significantly different from the database that Ontario sheriffs obtain from the municipal assessment rolls in that First Nations persons living on reserves are included to some degree in the British Columbia database. He acknowledged, however, that no one knew the extent to which First Nations individuals chose to be enumerated and the reason the Ministry was taking the extra step to write to First Nations was to ensure that "they were given an opportunity to be included in the database."<sup>156</sup>

### (C) NORTHWEST TERRITORIES

162. With its vast size and low population density, the Northwest Territories faces particular challenges in holding jury trials. Jury trials became available in the Northwest Territories in 1955. However, between 1955 and 1968, Aboriginal individuals served on juries in only 27 of the 66 jury trials held in the Northwest Territories, despite forming an overwhelming majority of the Northwest Territories population.<sup>157</sup> Steps were taken during this period to improve the participation of Aboriginal peoples in the jury process. For instance, Mr. Justice Sissons, who was appointed to the Northwest Territories Territorial Court in 1955, committed the court to holding trials in the community where a crime took place and established a circuit court that travelled throughout the territory to hear criminal cases.<sup>158</sup>

163. In 1988, the Northwest Territories *Jury Act* was amended to permit jurors fluent in only one of the Territories' official languages to sit as a juror.<sup>159</sup> There are eleven official languages in the Northwest Territories: Chipewyan, Cree, South Slavey, North Slavey, Gwich'in, Inuvialukutin, Inuinnaqtun, Tlicho, Inuktitut, English, and French.<sup>160</sup> Consequently, under the amended section of the *Jury Act*, a First Nations individual living in the Northwest Territories who speaks only one or several First Nations languages can serve on a jury. To carry these reforms into effect, the Department of Justice in the Northwest Territories established an interpreter training program, consisting of an eight week course, with two weeks spent focusing on jury trials.<sup>161</sup> These interpreters play a number of roles during trials, including assisting the sheriff in assembling jury panels by explaining to people why they have been summoned, and translating evidence, arguments, and closing and opening statements.<sup>162</sup>

164. The jury roll in the Northwest Territories is composed by the sheriff, who obtains the names of residents in the Territories from the Director of Medical Insurance.<sup>163</sup> However, the regulations passed under the *Jury Act* permit the sheriff to use other source lists, including electoral and assessment rolls.<sup>164</sup> The jury list for

<sup>156</sup> Letter from Barry Penner, Q.C., Attorney General for British Columbia to Jason Gratl, British Columbia Civil Liberties Association (July 11, 2011) Re. First Nation Underrepresentation on Jury Rolls.

<sup>157</sup> Mark Israel, "The Underrepresentation of Indigenous Peoples on Canadian Jury Panels" (2003) 25 Law and Policy 37 at 42.

<sup>158</sup> Christopher Gora, "Jury Trials in the Small Communities of the Northwest Territories" (1993) 13 Windsor Yearbook of Access to Justice 156 at 161.

<sup>159</sup> *Jury Act*, R.S.N.W.T. 1988 c. 5.

<sup>160</sup> *Official Languages of the Northwest Territories*, online: Northwest Territories Education, Culture and Employment <[http://www.ece.gov.nt.ca/pdf\\_File/Official%20Language/024-Official%20Languages%20Map-web.pdf](http://www.ece.gov.nt.ca/pdf_File/Official%20Language/024-Official%20Languages%20Map-web.pdf)>.

<sup>161</sup> Christopher Gora, *supra* note 158 at 165-166.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Jury Act*, *supra* note 159 at c.J-2, s. 8(2).

<sup>164</sup> *Jury Regulations*, NWT Reg (Nu) 034-99, s. 3(1).



each trial is “drawn from within thirty kilometers of the court,” and consequently prospective jurors are nearly all from the same community as the accused.<sup>165</sup> The emphasis on involving the community in the criminal justice system was praised by the Manitoba Public Inquiry into the Administration of Justice, which stated:

This solution is attractive to us, since it seeks to return to the community involved in a direct sense of involvement in, and control and understanding of, the justice system. [...] In aboriginal areas, those people would be able to understand the nuances that might apply to the relationship between victim and accused, or local factors that might escape the attention of non-aboriginal people.<sup>166</sup>

165. While there are significant differences between the Northwest Territories and Ontario, there are also certain similarities: the size and remoteness of the First Nations communities in Ontario’s northern judicial districts; their perspectives on justice issues; and the fact that some First Nations individuals still speak only Aboriginal languages. As I discuss in my recommendations below, some of the approaches adopted in the Northwest Territories merit consideration in the Ontario context.

#### **(D) ALBERTA**

166. The Alberta *Jury Act* authorizes the sheriff in that province to obtain names for jury rolls using information from lists provided by the municipal property officer, including the list of electors, the assessment rolls, and any other public papers.<sup>167</sup> The *Jury Act* Regulation further specifies that jury selection may be made from any or all of: (a) lists of electors, assessment rolls and other public papers obtained from municipalities; (b) telephone directories; (c) Henderson’s Directories for municipalities; and (d) any other source that the sheriff considers appropriate.<sup>168</sup>

167. There appear to have been some concerns expressed at various times as to whether the Alberta jury list is representative of First Nations peoples. In 1991, an Alberta task force examining the criminal justice system and Aboriginal peoples was told that Aboriginal persons were not being summonsed for jury duty. It recommended that Aboriginal peoples be included on jury lists.<sup>169</sup>

#### **(E) OTHER PROVINCES THAT USE HEALTH INSURANCE RECORDS TO COMPILE THE JURY ROLL**

168. As I described above in my discussion of the experience of Manitoba, it has, since 1983, relied on computerized records from the Manitoba Health Services Commission to compose jury lists, a practice that Manitoba’s Public Inquiry into the Administration of Justice and Aboriginal People described as a preferable source for compiling the jury roll. Saskatchewan, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador (and the Northwest Territories, as mentioned above) have adopted this same approach.

169. *Saskatchewan*. Saskatchewan’s *Jury Act* empowers the Inspector of Legal Offices to requisition the register maintained for the *Saskatchewan Medical Care Insurance Act* as the source list for jury rolls in the province.<sup>170</sup> This practice appears to have been adopted as a result of a proposal initially made by the Law

<sup>165</sup> Mark Israel, *supra* note 157 at 48.

<sup>166</sup> Cited in Mary Crnkovich and Lisa Addario, *Inuit Women and the Nunavut Justice System*, (Ottawa: Statistics Canada, Research and Statistics Division, 2000) at 7.

<sup>167</sup> *Jury Act*, RSA 2000, c J-3, s. 7.

<sup>168</sup> *Jury Act Regulation*, Alta Reg. 68/1983.

<sup>169</sup> *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta*, vol. 1 (Main Report) (Alberta: Justice and Solicitor General, March 1991) at 44-45 to 44-46. See also the comments in Mark Israel, *supra* note 157 at 41.

<sup>170</sup> *The Jury Act*, Statutes of Saskatchewan 1998, c. J-4.2, s. 7(1).



Reform Commission of Saskatchewan, which recommended in its report *Proposals for the Reform of the Jury Act*, after canvassing potential sources for the jury pool, that the best available source was the list of beneficiaries under the *Saskatchewan Hospitalization Act*.<sup>171</sup>

170. *Quebec*. The Quebec *Jurors Act* requires the sheriff to collect the names of prospective jurors from the electoral roll, but makes special provision for First Nations people living on-reserve. In particular, the Quebec Act permits the sheriff to gather the names of First Nations people living on-reserve using municipal valuation rolls, Band Lists drawn up in accordance with the *Indian Act*, and the population register of the *Ministère de la Santé et des Services sociaux*.<sup>172</sup>

171. *New Brunswick*. The New Brunswick *Jury Act* empowers the sheriff to collect names from lists of the following: beneficiaries under the *Medical Services Payment Act*, electors under the *Elections Act*, electors under the *Municipal Elections Act*, and registered owners of motor vehicles under the *Motor Vehicle Act*.

172. *Nova Scotia*. The Nova Scotia *Juries Act* empowers the sheriff to collect names for the jury roll from the province's Health and Wellness' Health Insurance list.<sup>173</sup> The issue of representation of First Nations peoples on juries has been given some attention in Nova Scotia. In 1994, the Law Reform Commission of Nova Scotia recommended that educational materials be made available in the Mi'kmaq language to foster greater interest in the jury system among members of that community.<sup>174</sup> The Commission also recommended that the province cease choosing jurors from the voters list and substitute a more comprehensive computerized list such as the medical service insurance list,<sup>175</sup> a recommendation that led to the adoption of that practice by the government. The Royal Commission on the Donald Marshall, Jr. Prosecution in 1989 also dealt with this issue, encouraging further study on the issue of proportional representation of minorities (including Mi'kmaq) on juries, in light of concerns about underrepresentation.<sup>176</sup>

173. *Prince Edward Island*. Under the Prince Edward Island *Jury Act*, the sheriff acquires names for the jury roll by requisitioning from time to time the names of residents in the province registered under the *Health Services Payment Act*.<sup>177</sup>

174. *Newfoundland and Labrador*. The Newfoundland and Labrador *Jury Act* allows the sheriff to refer to multiple source lists to create the jury roll. In particular, the sheriff can refer to the list of electors under the *Elections Act*, 1991, motor vehicle registration records under the *Highway Safety Traffic Act*, and the list of beneficiaries under the *Medical Care Insurance Act*, 1999.<sup>178</sup> Additionally, the regulations passed under that Act permit the sheriff to look to the licensed drivers database, the membership list of a francophone association, the telephone directory, and any other source considered appropriate by the sheriff.<sup>179</sup>

<sup>171</sup> Law Reform Commission of Saskatchewan, *Proposals for the Reform of the Jury Act*, (Saskatchewan: December 1979) at 18-20

<sup>172</sup> *Jurors Act*, RSQ, c. J-2, s. 42.

<sup>173</sup> *Juries Regulations*, O.I.C. 2000-356 (June 29, 2000), N.S. Reg. 126/2000; *Juries Act*, SNS 1998, c. 16.

<sup>174</sup> Law Reform Commission of Nova Scotia, *Final Report on Juries in Nova Scotia* (Nova Scotia: June 1994) online: <[http://www.lawreform.ns.ca/Downloads/Jury\\_FIN.pdf](http://www.lawreform.ns.ca/Downloads/Jury_FIN.pdf)> at 42.

<sup>175</sup> Law Reform Commission of Nova Scotia, *Juries in Nova Scotia* (Nova Scotia: June 1993) online: <[http://www.lawreform.ns.ca/Downloads/Jury\\_DIS.pdf](http://www.lawreform.ns.ca/Downloads/Jury_DIS.pdf)> at 2-3, 5-6, 9-10, 21-24 and 26-28.

<sup>176</sup> *The Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax: McCurdy's Printing and Typesetting Limited, December, 1989) at 12.

<sup>177</sup> *Jury Act*, R.S.P.E.I. 1998, c. J-5.1, s. 8.

<sup>178</sup> *Jury Act*, 1991, S.N.L. 1991, c. 16, s. 14(1).

<sup>179</sup> *Prospective Jurors Alternate Sources Regulations*, NLR 88/99, s. 2.

## 2. EXPERIENCE IN OTHER COUNTRIES

### (A) AUSTRALIA

175. Aboriginals have historically been underrepresented on juries throughout Australia. In a 1983 report on Aboriginal Customary Law, the Australian Law Reform Commission wrote:

... the representation of Aborigines on juries has changed little in recent years. In those parts of Australia where Aborigines represent a sizeable proportion of the population, it is still rare for an Aborigine to sit on a jury.<sup>180</sup>

176. More recent publications and law reform commission reports indicate that, while efforts have been made to improve Aboriginal representation on juries in Australia, it remains a live issue in all six states across the country.

177. Each state exercises general legislative powers over matters of criminal law and procedure, including the process of jury trial.<sup>181</sup> At a general level, the process for composing the jury roll is similar in most states: the sheriff randomly selects names from electoral rolls for inclusion on jury rolls. However, the minutiae of the selection process differs across states, resulting in varying degrees of jury representativeness throughout the country.

178. The law reform commissions of three states – New South Wales, Queensland and Western Australia – have conducted extensive and recent examinations of the jury system. The reports of these commissions have included discussions respecting the underrepresentation of Aboriginals on jury rolls and made a number of findings and recommendations, which I mention below.

179. As in Canada, the value of a representative jury is recognized in Australia. As the Law Reform Commission of Western Australia stated in its 2009 report, “representation is generally considered to be the principal concept guiding juror selection.”<sup>182</sup> According to the Commission, it is through its representativeness that the criminal justice system derives its legitimacy,<sup>183</sup> and a representative jury is “a body of persons representative of the wider community”.<sup>184</sup> But the Commission also made clear that a jury does not have to be proportionately representative of the community at large; rather, it is enough that “all ethnic and social groups in the community should have the *opportunity* to be represented on juries (emphasis in original).”<sup>185</sup>

180. Unlike in the United States or Canada, voting is mandatory in Australia. Consequently, voting lists in that country are more likely than those in Canada or the United States to be comprehensive. There is no evidence that Aboriginals in Australia are registered to vote in lower proportions than those of the descendants of European settlers, since the voting registration system does not record race. However, the Queensland Law Reform Commission, in its 2011 report, suggested that Aboriginals may be underrepresented on that state’s electoral roll because of low-levels of education and literacy, health and social conditions, and the general remoteness of indigenous communities and the transient nature of their inhabitants.<sup>186</sup> The Commission recommended that people be asked to register as Aboriginal when they register to vote in order to provide more information on this point.<sup>187</sup> The Commission also found that Aboriginals are more likely

<sup>180</sup> Australian Law Reform Commission, *Aboriginal Customary Law Research Paper no. 13*. (Canberra: AGPS, 1983) at para. 590.

<sup>181</sup> Michael Chesterman, “Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy” (1999) *Law and Contemporary Problems* 69 at 71.

<sup>182</sup> Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors: Discussion Paper, Project No. 99* (Perth, Western Australia: Quality Press, 2009) at 14.

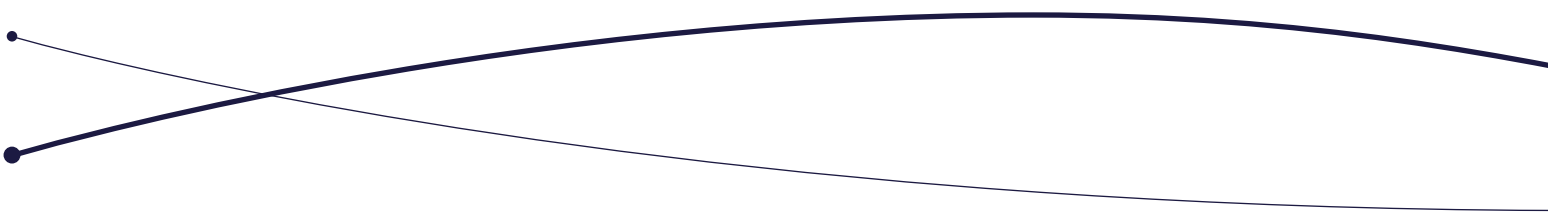
<sup>183</sup> *Ibid.*

<sup>184</sup> Law Reform Commission of New South Wales, *Report 117 – Jury Selection* (Sydney: 2008) at 1.21.

<sup>185</sup> Law Reform Commission of Western Australia, *supra* note 182 at 14. Law Reform Commission of New South Wales, *Ibid.*

<sup>186</sup> Queensland Law Reform Commission, *A Review of Jury Selection, Report No. 68* (Queensland: QLRC, February 2011) at 75.

<sup>187</sup> *Ibid.*, at xxii.



than non-Aboriginals to live outside of jury districts.<sup>188</sup> In addition, Aboriginals are more difficult to summon because they are more likely to lead transient lifestyles.<sup>189</sup>

181. Even if a summons is issued, a variety of factors mean that Aboriginals are more likely to be disqualified or will otherwise not become a part of the jury panel. For instance, in some states public transport is limited and prospective Aboriginal jurors may be unable to travel to the court for jury selection. Similarly, a lack of available accommodation near the court increases the likelihood that Aboriginals will be unable to serve on a jury. Aboriginals are also more likely to be disqualified on the basis of prior convictions, because, like Aboriginal persons in Canada, they are disproportionately overrepresented in the criminal justice system and in prison.<sup>190</sup> Moreover, they are also more likely to lack the necessary language skills to serve on a jury.<sup>191</sup>

182. The Australian law reform commissions have also identified various cultural factors that may explain Aboriginal underrepresentation. For example, the Law Reform Commission of Western Australia noted that Aboriginal jurors had expressed discomfort about being required to judge people they did not know.<sup>192</sup> Similarly, the Law Reform Commission of New South Wales notes that in the past Aboriginals have asked to be excused from jury service on the basis that sitting in judgment of another may harm their standing with their community.<sup>193</sup> At the jury panel selection stage, the commentator, Mark Israel, notes that there is evidence in New South Wales that some prosecutors have challenged the inclusion of Aboriginal jurors in cases where the defendant was also Aboriginal.<sup>194</sup>

183. Australian law reform commissions have proposed various measures to remedy Aboriginal underrepresentation on jury panels. To address the issue of underrepresentation as a result of prior convictions (given that Aboriginals represent a disproportionate percentage of the prison population in Australia), the Law Reform Commission of New South Wales recommended reducing the number of years that offenders are barred from jury service from ten years for all offences to two to five years, depending on the type of offence.<sup>195</sup> This recommendation was enacted into law by the New South Wales *Jury Amendment Act 2010*, which removed the uniform ten-year disqualification and replaced it with a graduated scheme for the exclusion of people on the basis of criminal history.<sup>196</sup> This proposal was also endorsed by the Queensland Law Reform Commission.<sup>197</sup> With respect to the issue of Aboriginals living outside of the jury district, the Queensland Law Reform Commission recommended that local governments review existing jury districts with a view to including Aboriginal communities, while the Law Commission of New South Wales proposed the adoption of a 'smart electoral roll' that would provide a more flexible tool for including individuals on the local court's jury roll.<sup>198</sup> Finally, the Queensland Law Reform Commission proposed a series of logistical measures aimed at improving Aboriginal underrepresentation, including: making transport arrangements to ensure that Aboriginals can attend court when summoned, making available accommodation near the court for people who cannot travel to the court each day of a trial, creating culturally appropriate educational programs to promote the importance of jury service, conducting more extensive research, and establishing a working group to ensure that any reforms are successful.<sup>199</sup>

<sup>188</sup> Law Reform Commission of New South Wales, *supra* note 184 at 11.21, 11.69.

<sup>189</sup> Queensland Law Reform Commission, *supra* note 186 at 6.14.

<sup>190</sup> *Ibid.*, at 6.57.

<sup>191</sup> Law Reform Commission of Western Australia, *supra* note 182 at 94.

<sup>192</sup> *Ibid.*, at 47.

<sup>193</sup> Law Reform Commission of New South Wales, *supra* note 184 at 1.35.

<sup>194</sup> Mark Israel, "Ethnic Bias in Jury Selection in Australia and New Zealand" (1998) *International Journal of Sociology* 35 at 44.

<sup>195</sup> Law Reform Commission of New South Wales, *supra* note 184 at 3.19-3.23.

<sup>196</sup> Queensland Law Reform Commission, *supra* note 186 at 11.38.

<sup>197</sup> *Ibid.*, at 6.148-6.150.

<sup>198</sup> *Ibid.*, at 11.86, 11.18-11.19.

<sup>199</sup> *Ibid.*, at 11.86.

184. However, the law reform commissions have rejected more radical suggestions for improving representativeness that have also been rejected by Canadian courts. For instance, the Law Reform Commission of New South Wales rejected the use of special panels composed largely (or entirely) of members of the racial or ethnic group of the accused owing to the practical difficulties associated with their establishment, among other things.<sup>200</sup> Similarly, the Law Reform Commission of Western Australia found that allowing a trial judge to order the inclusion of a person of the same race or ethnic group of the accused would not be appropriate, since it would interfere with the principle of random selection.<sup>201</sup> The Queensland Law Reform Commission rejected a similar proposal.<sup>202</sup>

## (B) NEW ZEALAND

185. The New Zealand Law Commission conducted an extensive study of the use of criminal jury trials in that country in 2001 and found that the Māori people in New Zealand, like First Nations in Canada, are underrepresented on juries and overrepresented as defendants in criminal proceedings.<sup>203</sup> The New Zealand Law Commission identified ‘representativeness’ as one of four necessary features of the jury system,<sup>204</sup> and they provided the following definition: “what is required [for a representative jury] is that all persons who are eligible to serve on juries, including those you are younger or older, or from ethnic minorities, do have an equal *opportunity* to serve (emphasis in original).”<sup>205</sup> In their report, the New Zealand Law Commission recommended a number of measures to make juries generally more representative, including: improving the representativeness of jury rolls (the source of jury lists) through outreach campaigns that encourage young people and minorities to become registered voters; extending judicial district boundaries; considering the question of representativeness in applications for a change of venue where the demographic composition of the jury roll in the venue where the crime is to be tried creates a likelihood of prejudice; and updating guidelines for excusing jurors to allow jurors to defer their service, rather than be excused from it altogether.<sup>206</sup>

186. As in Canada, the history of the introduction of a foreign legal system and the exclusion of the Māori people from this system has created a sense of alienation. In the New Zealand Law Commission’s consultations with Māori people, many of the same concerns raised by members of First Nations communities in our discussions as part of this Independent Review were raised. As the Commission stated: “it was emphasized to us that many Māori feel very strongly that juries are not representative of Māori society, and this underrepresentation contributes to a general feeling of alienation from the criminal justice system.”<sup>207</sup>

187. The Commission identified the three main reasons for the underrepresentation of Māori on juries lists. First, jury lists in New Zealand are drawn from voters lists, but Māori are far less likely than those of European ancestry to be registered voters. Second, once summoned to the court for jury selection, Māori are more likely than other citizens to be excused or disqualified. Third, once chosen for the jury panel they are more likely to be challenged by the Crown or by the defence.<sup>208</sup> One study reported that several of the lawyers and judges interviewed believed that prosecutors “tended to weed out Māori jurors because they were Māori when there was a Māori defendant”.<sup>209</sup> Various authors have also suggested that Māori have been excluded from juries because courthouses are predominantly located in the cities, while Māori mostly live in rural areas, and Māori are more mobile than other citizens and are therefore less likely to have a permanent address where a summons can be sent.<sup>210</sup>

<sup>200</sup> Law Reform Commission of New South Wales, *supra* note 184 at 1.51-1.53.

<sup>201</sup> Law Reform Commission of Western Australia, *supra* note 182 at 47.

<sup>202</sup> Queensland Law Reform Commission, *supra* note 186 at 11.106-11.110.

<sup>203</sup> New Zealand Law Commission, *Juries in Criminal Trials, Report 69* (Wellington: NZLC, 2001) online: <<http://www.lawcom.govt.nz/>> at para. 165.

<sup>204</sup> The others being competence, independence and impartiality.

<sup>205</sup> New Zealand Law Commission, *supra* note 203 at para. 135.

<sup>206</sup> *Ibid.*, at paras. 136-156.

<sup>207</sup> *Ibid.*, at para. 165.

<sup>208</sup> *Ibid.*, at para. 166.

<sup>209</sup> Mark Israel, *supra* note 194 at 40.

<sup>210</sup> *Ibid.*, at 39.



188. The Commission's study considered two solutions to Māori underrepresentation on juries: using source lists other than the electoral roll to select potential jurors, and ensuring that the proportion of Māori selected for jury lists is the same as the proportion in the jury district's broader population. Ultimately, the Commission rejected both of these solutions.<sup>211</sup> Using source lists other than the electoral roll would be unduly cumbersome and expensive, and instead, greater efforts should be made to encourage more Māori to register to vote. Tailoring the number of Māori selected for jury lists to the number living in the jury district was similarly unacceptable since it would run counter to the principle of ensuring a representative jury. The Commission stated that "once an exception is made for one group there is no reason in principle why it should not be made for all other ethnic minorities and any other group."<sup>212</sup> In addition, the Commission found that practical difficulties such as securing adequate childcare during jury service imposed a particular burden on Māori individuals, and that making childcare allowances available would help to remedy this problem.<sup>213</sup>

## (C) UNITED STATES

189. There are fifty states in the United States, each with its own court system and jury selection process, as well as a federal court system with its own jury selection process. For this Report, I will deal only with two American states: Alaska because of its sizable Aboriginal population; and New York because of the particular steps it has taken to deal with the underrepresentation of minorities on its juries. At the federal court level, the *Jury Selection and Service Act* stipulates that names for the jury source list are to be drawn from voter registration lists, lists of actual voters, and other available sources where necessary.<sup>214</sup> Aboriginal people who retained their tribal membership were formally excluded from federal juries until 1924, when Congress declared them citizens.<sup>215</sup>

### (i) Alaska

190. Alaska's Aboriginal population represents approximately 16 per cent of that state's overall population, but like many jurisdictions in Canada, the Aboriginal population is "overrepresented within Alaska prisons".<sup>216</sup> Much of Alaska's Aboriginal population lives in a series of about 200 small villages (referred to collectively as 'the Bush') outside of Alaska's main population centers of Juneau, Anchorage, and Fairbanks.<sup>217</sup> These cities are also home to the state's courts. Needless to say, the conditions and lifestyles in the Bush differ considerably from those in Alaska's major cities.

191. The standard practice in the state for holding trials prior to 1971 was to transport defendants to one of these cities for trial, and to select a jury from residents living within a fifteen mile radius of the trial site.<sup>218</sup> However, since the majority of the state's Aboriginal population lives in rural areas, this mode of selection often resulted in Aboriginals facing an all-white jury whose members were utterly unfamiliar with lifestyles and conditions in rural communities.<sup>219</sup>

<sup>211</sup> New Zealand Law Commission, *supra* note 203 at paras. 168-174.

<sup>212</sup> *Ibid.*, at para. 173.

<sup>213</sup> *Ibid.*, at para. 496.

<sup>214</sup> Judge Nancy Gertner, "12 Angry Men (And Women) in Federal Court" (2007) 82 Chicago-Kent L.R. 613 at 617; *Jury Selection and Service Act of 1968*, 28 U.S.C. § 1861.

<sup>215</sup> Albert Alschuler and Andrew Deiss, "A Brief History of the Criminal Jury in the United States" (1994) 61 The University of Chicago L.R. 867 at 884.

<sup>216</sup> Rachel King, "Bush Justice: The Intersection of Alaska Natives and the Criminal Justice System in Rural Alaska" (1998) 77 Oregon L.R. 1 at 2.

<sup>217</sup> Jeff May, "Alvarado Revisited: A missing Element in Alaska's Quest for Provide Impartial Juries for Rural Alaskans" (2011) 28 Alaska L.R. 246 at 246.

<sup>218</sup> *Ibid.*, at 247.

<sup>219</sup> *Ibid.*, at 255.

192. Recognizing these and other difficulties that arise where Aboriginals are tried before a jury composed entirely of non-Aboriginals, the Alaska Supreme Court in *Alvarado v. State* declared the practice of drawing jurors from within a fifteen mile radius of the trial unconstitutional.<sup>220</sup> In particular, the Court found that this practice violated an accused's Sixth Amendment right to be tried by a jury drawn "from a pool representing a fair cross-section of the community".<sup>221</sup> In *Alvarado*, the defendant was accused of rape in the community of Chignik, Alaska. He was arrested in Chignik and transported approximately 463 miles to Anchorage for trial. The population of Chignik was at the time 95 percent Aboriginal, while only 3.5 percent of Anchorage's population was Aboriginal.<sup>222</sup> Pursuant to the rules governing the selection of juries in force at the time, the jury was drawn from within fifteen miles of the site of the trial, and consequently, not a single Aboriginal person appeared on Alvarado's jury panel, let alone the petit jury.<sup>223</sup> Alvarado was found guilty, but he successfully challenged the composition of his jury panel in an appeal before the Alaska Supreme Court by arguing that the jury selection process "precluded residents from Chignik and virtually all Native villages within the district, thus violating his constitutional right to an impartial jury".<sup>224</sup> In finding that the this policy for selecting jurors was unconstitutional, the Alaska Supreme Court wrote that substituting members of one community (in this case Chignik) with those from another (Anchorage) substantially impairs "the democratic ideal inherent in the notion of an impartial jury as an institution representing a fair cross section of the community".<sup>225</sup> Instead, the community that must be represented on the jury panel is the community where the crime is alleged to have taken place.

193. In response to the Alaska Supreme Court's decision in *Alvarado*, the state legislature adopted Alaska Criminal Procedure Rule 18.<sup>226</sup> Rule 18 introduces a number of steps to help increase Aboriginal representation on juries in Alaska. First, it increases the number of trials sites outside of the state's major urban centers and requires that jurors be called from within a fifty-mile radius of each trial site. Second, it gives the trial judge the discretion to limit the number of miles from the courthouse from which prospective jurors are chosen; however the accused is given a corresponding right to have jurors called from the entire fifty mile radius if the first jury pool "fails to fairly represent a cross-section of the community".<sup>227</sup> Third, the defendant is given the right to move, within ten days of entering a plea, for the trial to be relocated from the presumptive trial site to an alternative trial site within the venue district that is nearest to the site where the crime occurred.<sup>228</sup> Fourth, if the fifty mile radius rule is unlikely to result in a jury that is representative of a fair cross-section of society, the accused or the court can request a change in the jury selection area.<sup>229</sup> In practice, this latter rule may be carried out in three ways: the trial venue may be relocated to a community that is more representative; the court may draw prospective jurors from beyond the fifty mile radius; or the court may organize the trial in a community where no trial site exists but which is more representative.<sup>230</sup>

194. Although the implementation of Rule 18 has made important steps towards improving Aboriginal representation on juries in Alaska, several commentators have identified remaining difficulties. For instance, certain rural communities are excluded because they do not fall within the fifty mile radius. Moreover, Rule 18 imposes the onus on defendants to request a change of venue within ten days; however they are often ignorant of this right.<sup>231</sup>

<sup>220</sup> *Alvarado v. State of Alaska*, 486 P.2d 891 (1971).

<sup>221</sup> Devon Knowles, "From Chicken to Chignik: The Search for Jury Impartiality in Rural Alaska Native Communities" (2005) 37 *Columbia Human Rights L.R.* 235 at 249; *Alvarado v. State*, 486 P.2d 891 (1971).

<sup>222</sup> Jeff May, *supra* note 217 at 260.

<sup>223</sup> *Ibid.*, at 261.

<sup>224</sup> *Ibid.*

<sup>225</sup> *Ibid.*, at 262.

<sup>226</sup> "Rule 18. Venue: Place for Trial," 2011-2012 *Alaska Rules of Criminal Procedure*, online: Alaska Court System <<http://courts.alaska.gov/crpro.htm#18>>.

<sup>227</sup> Devon Knowles, *supra* note 221 at 250.

<sup>228</sup> Jeff May, *supra* note 217 at 266.

<sup>229</sup> *Ibid.*

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*, at 249.

*(ii) New York*

195. New York uses a multiple source list approach to create its jury roll. The names of prospective jurors are drawn from the following five lists: registered voters, the holders of drivers' licenses or other identification issued by the Division of Motor Vehicles, state income tax filers, recipients of family assistance, and recipients of unemployment insurance.<sup>232</sup> The state updates these lists annually and has eliminated all automatic exemptions for jury service. At \$40 per day, the state pays one of the highest juror *per diems* in the United States. New Yorkers can also volunteer for jury duty, and after jury questionnaires have been sent out, two-follow ups are immediately sent to non-responders.

196. New York has taken a number of steps in response to biases against minorities in the state's court system. In 1988, the Chief Judge of New York created the Judicial Commission on Minorities, which exists to this day, as a body to study this problem and make recommendations to improve minority interactions with the court system. In a five-volume report issued in 1991, the Commission concluded that minorities are significantly underrepresented *on many juries in the court system*.<sup>233</sup> The Commission found that all-white juries in New York were a regular occurrence and minorities charged with an offence were likely to face juries where their peers are not represented.<sup>234</sup> Moreover, the Commission's report noted that there was evidence of peremptory challenges being used to exclude minorities from jury panels in trials where the defendant is also a member of a minority group.<sup>235</sup>

197. To address these shortcomings, the Commission made a number of recommendations, including expanding the number of sources from which prospective jurors are selected for the jury source list. In addition, the Commission recommended that measures be put in place to allow jurors to be "on call" for a trial.<sup>236</sup> This recommendation, which has been implemented, means that persons may be on call for a one-day trial for several days, and if they are not called, but were available, their jury duty is considered complete.<sup>237</sup> The Commission's report also recommended strict judicial scrutiny over peremptory challenges to ensure that prospective minority jurors are not improperly excluded and that jury questionnaires record race in order to provide more information for further study.

198. As a result of the U.S. Supreme Court decision in *Batson v. Kentucky*, the U.S. has constitutional limits on the use of peremptory challenges, banning their use in a racially discriminatory manner.<sup>238</sup> Subsequent cases have expanded this prohibition, widening the group of persons subject to the rule to include the defence counsel and lawyers in civil cases, and widening the group of prohibitions to include challenges based on sex, while some lower courts have added religion to the list.<sup>239</sup>

199. New York State has developed a line of jurisprudence under the *Batson* rule that appears to be broader than the rest of the country's application of those precedents. In its 2008 decision in *People v. Luciano*, the New York Court of Appeals noted that courts should forbid peremptory challenges based on "race, gender, or any other status that implicates equal protection concerns".<sup>240</sup> In one recent case, people with a hunting license were found to satisfy this test, and a mistrial was declared because the defence counsel peremptorily challenged all potential jurors with a hunting license.<sup>241</sup>

<sup>232</sup> Paula Hannaford-Agor, "Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must be Expanded" (2011) 59 Drake L.R. 761 at 780-781.

<sup>233</sup> Report of the New York State Judicial Commission on Minorities, (1991) 19 Fordham Urban L.J. 181 at 242.

<sup>234</sup> *Ibid.*, at 237.

<sup>235</sup> *Ibid.*, at 238.

<sup>236</sup> *Ibid.*, at 244.

<sup>237</sup> *General Information Questions and Answers*, online: New York State Unified Court System <<http://www.nyjuror.gov/juryQandA.shtml>>.

<sup>238</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>239</sup> Michael C. Dorf, "Are Hunters a Constitutionally-Protected Group? A New York Judge Says Yes" *FindLaw* (9 September 2010), online: <<http://writ.lp.findlaw.com/dorf/20100909.html>>.

<sup>240</sup> *People v. Luciano*, 1 No. 78 (N.Y. 2008).

<sup>241</sup> Michael C. Dorf, *supra* note 239.

200. Finally, in New York State, it is possible to volunteer for jury duty. The list of volunteers is used to supplement the five source lists that counties use to compile their jury rolls. Judge Dwyer of the New York Rensselaer County Court has gone so far as to mail “coupons” to residents, urging individuals to volunteer their names for the master jury list by filling out the form and mailing it back. One thousand residents responded to this initiative in 1993, and several hundred to a similar initiative in 1984.<sup>242</sup> Accepting volunteers seems to be a useful way to supplement the master source list with names of residents who do not appear on the other lists used.

### *(iii) Sending Jury Roll Questionnaires to Areas with Significant Minority Populations*

201. In 2006, following a 2005 study by U.S. District Judge Nancy Gertner, the U.S. District Court of Massachusetts revised its jury plan along the following lines: “a jury summons returned as undeliverable from any of the court’s three geographic divisions will spur the court to send another summons to another resident in the same zip code.”<sup>243</sup> Also, to keep lists more up to date and to try to negate the effects of a more transient renter population, the jury roll derived from postal addresses will be updated every six months.<sup>244</sup>

202. Based on this initiative, the U.S. District Court of Kansas amended its jury plan in 2007 to include a “supplemental draw” in which the response to an undeliverable summons will be sending of a new summons to someone in the same zip code.<sup>245</sup> This initiative not only includes undeliverable summonses, but also nonresponsive ones, an expansion on the Massachusetts initiative.

203. Currently, an ad hoc committee of Eastern Michigan judges, appointed by Chief Judge Gerald Rosen and co-chaired by Judge Victoria Roberts, is considering reforms to the jury selection system in the U.S. District Court of Eastern Michigan along similar lines of those of Massachusetts and Kansas, outlined above.<sup>246</sup>

<sup>242</sup> Stephanie Domitrovich, “Jury Source Lists and the Community’s Need to Achieve Racial Balance on the Jury” (1994), 33 Duquesne L.R. 39 at 97.

<sup>243</sup> “Courts Try to Maximize Jury Diversity” *The Third Branch* (July 2007), online: [http://www.uscourts.gov/News/TheThirdBranch/07-07-01/Courts\\_Try\\_to\\_Maximize\\_Jury\\_Diversity.aspx](http://www.uscourts.gov/News/TheThirdBranch/07-07-01/Courts_Try_to_Maximize_Jury_Diversity.aspx)

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

<sup>246</sup> “Why so few black jurors?” *The Detroit Free Press* (3 June 2012), online: <http://www.freep.com/article/20120603/OPINION01/206030445/Editorial-Why-so-few-black-jurors->>.







# PART IV

## THE JURY SYSTEM AND FIRST NATIONS: THE FUTURE



## A. INTRODUCTION

204. FROM THE FOREGOING, IT IS CLEAR THAT THE JURY SYSTEM IN ONTARIO, LIKE THE PROVINCE'S JUSTICE SYSTEM MORE GENERALLY, AND ITS COUNTERPARTS ACROSS A VARIETY OF CANADIAN AND INTERNATIONAL JURISDICTIONS, HAS OFTEN IGNORED OR DISCRIMINATED AGAINST ABORIGINAL PERSONS. THIS PART OF THE REPORT FOCUSES ON HOW THE REPRESENTATION OF FIRST NATIONS PEOPLES CAN BE IMPROVED ON ONTARIO'S JURIES.

205. This task cannot be accomplished without substantial input from First Nations people, as well as the organizations working on the ground. It is for this reason that I have gone into great depth in describing, in section B, my visits and meetings with First Nations people, government officials, and members of the judiciary, and in section C, the written submissions I received from First Nations, non-governmental, and government organizations. From this accumulation of experience and input, in section D, I conclude by offering my recommendations.

## B. RESULTS OF VISITS AND MEETINGS

206. The visits and meetings carried out during the engagement phase of the Independent Review have been an important source of information and ideas that have assisted me greatly in understanding the systemic problems First Nations individuals face in dealing with the criminal justice system, and also the mechanics of the jury selection process and the efforts to assemble the jury roll in so far as First Nations residents on reserve are concerned. The First Nations we visited enlightened us with respect to their important perspectives regarding culture, responsibilities as leaders of their communities, and the many issues they must overcome to possess the capacity to serve as jurors. The government officials and members of the judiciary recognized the importance of this Review in providing information and suggestions from their experience to deal with the problems that are thwarting the proper inclusion of First Nations peoples on juries in Ontario, and offered their full cooperation.

### 1. FIRST NATIONS SESSIONS

207. During the course of the Independent Review, I had the opportunity to visit many wonderful and, in many ways, remarkable communities. Without exception, I was welcomed into every community and treated with kindness, generosity, and respect. I met many articulate leaders and people, young and old, who keenly offered their insights and perspectives with respect to the criminal justice and jury systems. The prevailing message I learned from every First Nation I visited was very clear: substantive and systemic changes to the criminal justice system are necessary conditions for First Nations participation on juries in Ontario. I refer to this lesson often in this Report; its repetition reflects the centrality of its importance.

208. Many common themes arose during the engagement sessions, and I summarize the issues and points discussed under these topics. The list of First Nations and government officials I met throughout this process is attached as Appendix E to this Report.

## (A) FIRST NATIONS PEOPLES' PERSPECTIVES ON THE JUSTICE SYSTEM

### CHILL THEIR DESIRE TO SERVE ON ONTARIO JURIES

209. In the opinion of First Nations representatives we met, the most significant systemic barrier to the participation of First Nations peoples in the jury system in Ontario is the negative role the criminal justice system has played in their lives, culture, values, and laws throughout history. This became very apparent in discussions with First Nations leaders, Elders, and others during the engagement sessions. They uniformly expressed the position that, until significant and substantive changes are made to the criminal justice system, the issue of jury participation will not improve.

#### (i) Cultural Barriers

210. One of the biggest challenges expressed by many First Nations leaders and people is with respect to the conflict that exists between First Nations' cultural values, laws, and ideologies regarding traditional approaches to conflict resolution, and the values and laws that underpin the Canadian justice system. The objective of the traditional First Nations' approach to justice is to re-attain harmony, balance, and healing with respect to a particular offence, rather than seeking retribution and punishment. First Nations observe the Canadian justice system as devoid of any reflection of their core principles or values, and view it as a foreign system that has been imposed upon them without their consent.

211. Unfortunately, the criminal justice system represents deep-rooted pain and oppression for many First Nations peoples. The system is perceived not only as a tool to subjugate traditional approaches to conflict resolution in favour of assimilation into the mainstream society, but also as a mechanism by which a myriad of historical wrongs have been perpetrated upon First Nations. Today, First Nations peoples see themselves either as spectators to or victims of the justice system, whereas historically they were direct participants in the resolution of conflict within their own communities. To be asked to participate in Canada's justice system is seen by many First Nations people as contributing to their own oppression and, therefore, repugnant. These sentiments are not surprising, as many experts and authors have recognized the failure of the justice system for First Nations. For example, the Royal Commission on Aboriginal People observed:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada - First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural - in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.<sup>247</sup>

212. That being said, however, a number of the First Nations people with whom I met expressed a willingness and desire to work towards a reconciliatory model of justice that respects and incorporates First Nations traditional values and laws as a matter of self-governance within Canada's justice system. I will discuss this desire in more detail later in the Report.

213. Another core traditional First Nations value that often prevents many First Nations people from participating on juries for criminal trials relates to the cultural teaching that a person is not to sit in judgment of the actions of another or to direct a person's actions. Rather than judge an offence committed by an individual and determine his or her fate, the traditional Aboriginal justice process was aimed at restoring the offender and the victim to a place of harmony, peace, healing, and reconciliation. Because criminal trials require the jury to make a finding of guilt or innocence, which potentially affects a person's future in a negative way, many First Nations people feel unwilling to participate in that process. It is noteworthy



that many First Nations people expressed an interest in participating in coroner's inquests, viewing the role of the coroner's jury, which does not make findings of guilt and which recommends changes to a system to prevent similar tragedies, as more aligned with their cultural understandings and ideologies.

### *(ii) Systemic Discrimination*

214. First Nations people often spoke of the systemic discrimination that either they or their families have experienced within the justice system as it related to criminal justice or child welfare. Negative experiences of the criminal justice system, along with historic limitations on the rights of First Nations, have created negative perspectives and an intergenerational mistrust of the criminal justice system. Such perceptions, by implication, extend to participation in the jury process. First Nations people generally view the criminal justice system as working against them, rather than for them. It seems counterintuitive to them to participate in it.

215. I heard numerous tragic stories of First Nations individuals' experiences with the justice system at various levels, and what they clearly revealed were pervasive systemic problems with the way in which justice is delivered, and is seen to be delivered, to First Nations individuals. Many persons accused of crimes plead guilty to their offences, rather than electing trial, in order to have their charge resolved quickly but without appreciating the consequences of their decision. In fact, many First Nations individuals explained that they have never known a friend or family member who, when charged, proceeded to trial. Many of these accused persons believe they will not receive a fair trial owing to racist attitudes prevalent in the justice system, including those of jury members. A question was raised about whether the so-called *Gladue* reports were being properly prepared, or if they were even prepared at all for First Nations offenders. Also mentioned was the fact that provincial court judges attend remote First Nations communities only once every 60 to 90 days, resulting in long delays. Lastly, remands were mentioned in the context that they are a common occurrence and many cannot afford to travel to larger communities where the nearest Superior Court of Justice is located.

216. I also heard about the need for court workers in the communities to assist with the court process, and the absence of translation services afforded to First Nations people who do not speak English, leading to fundamental misunderstandings of the criminal justice process and, consequently, a guilty plea or a conviction. More disturbing were the anecdotes relayed to me regarding inhumane treatment afforded to First Nations people in jail. For example, I was told of a First Nations accused person being released from a Kenora jail without footwear or socks in the winter months. I was also told about the general ill-treatment and lack of dignity afforded to First Nations people in jail by the guards, and the lack of support and adequate probation services for offenders upon release from jail to facilitate their integration back into the community, which often contributes to re-offending.

217. Because my review was not a formal witness hearing inquiry, I did not ascertain the truth of these allegations. Quite frankly, that is not relevant. Even if they are only perceptions, they are instructive, because to First Nations people those perceptions inform their opinion about the justice system and that is the relevant and important consideration.

218. According to First Nations people with whom I spoke, there is a real fear that the passage of the *Safe Streets and Communities Act*, recently enacted legislation that among other things imposes mandatory minimum sentences, eliminates conditional sentences, and extends the time before which applications for pardon can be made, will perpetuate the systemic discrimination in the justice system and increase the rate of incarcerated First Nations people, many of whom would not otherwise be incarcerated, such as first time and non-violent offenders.<sup>248</sup> Many First Nations people believe this Act will reduce funding for crime prevention, police enforcement, and victim and rehabilitation programs – all core justice-related services that First Nations communities urgently need.

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<sup>248</sup> *Safe Streets and Communities Act*, SC 2012, c. 1.

219. Justice challenges in northern First Nations communities are distinct and more drastic than appears to be the case in central and southern First Nations communities. The First Nations people I met in northern communities described a systemic lack of access to adequate legal services to defend charges, a deficiency that not only compromises their legal rights but also compounds their aversion to participate in the jury system. As mentioned above, the remote locations of First Nations require duty counsel and judges to fly into communities in varying frequency – typically every 60 to 90 days for one to two day periods – and limit access to their legal counsel. These circumstances pose challenges that compromise a First Nation accused’s ability to properly defend himself or herself.

220. The lack of adequate infrastructure available to house court proceedings poses another challenge that compromises the delivery of justice in the North. It was explained that First Nations individuals in certain regions must attend court to address their charges in make-shift court rooms temporarily housed in arenas or dilapidated community halls. These venues do not provide adequate space for private interview rooms, and create an environment that lacks the decorum, respect, and formality ordinarily required for a court of law. It is understandable that First Nations people are reluctant to participate in the justice system, and particularly on juries, when their interactions with the system are anything but positive, respectful, or fair.

221. Since at least 1999, the Supreme Court of Canada has repeatedly recognized the urgency of measures required to address the crisis the criminal justice system presents to First Nations peoples. In *R. v. Gladue*, after recounting the numerous reports and studies on the Aboriginal justice issues, the Court stated:

These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem.<sup>249</sup>

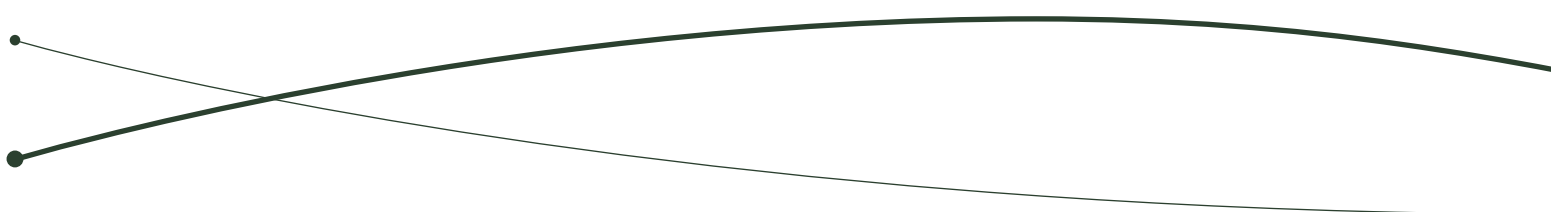
222. Most recently, the Supreme Court had an opportunity to assess the impact of its earlier decision in *Gladue*, and the hope for changes to the criminal justice system that would address systemic issues affecting First Nations peoples. This assessment was not positive:

This cautious optimism has not been borne out. In fact, statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened. In the immediate aftermath of Bill C-41, from 1996 to 2001, Aboriginal admissions to custody increased by 3 percent while non-Aboriginal admissions declined by 22 percent... From 2001 to 2006, there was an overall decline in prison admissions of 9 percent. During that same time period, Aboriginal admissions to custody increased by 4 percent... As a result, the overrepresentation of Aboriginal people in the criminal justice system is worse than ever. Whereas Aboriginal persons made up 12 percent of all federal inmates in 1999 when *Gladue* was decided, they accounted for 17 percent of federal admissions in 2005... As Professor Rudin asks: “If Aboriginal overrepresentation was a crisis in 1999, what term can be applied to the situation today?”<sup>250</sup>

223. Despite this grim backdrop, I engaged in a number of positive discussions with First Nations leaders and community members regarding initiatives First Nations had taken to assert leadership over various aspects of the justice system in their respective communities. First Nations leaders in various communities recalled a time when the Province had funded a restorative justice program. As I understand it, this program allowed First Nations to develop a cultural approach to justice through the organization of justice committees that began to integrate First Nations principles into the delivery of justice. In particular, in Sandy Lake First Nation, I heard about the consultative role of Elders in the sentencing of First Nations offenders,

<sup>249</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 64.

<sup>250</sup> *R. v. Ipeelee*, 2012 SCC 13 at para. 62. Citations embedded in the quotation have been omitted.





originally developed through the restorative justice program. This practice has been admirably accepted by the local judiciary, and has continued, with Elders volunteering in the face of funding cuts to a program they deemed too important to end. I was advised that Elder advisors were also used in the Attawapiskat First Nation. These are the kind of steps that are helpful in moving towards the integration of First Nations principles and values into the justice system.

### *(iii) Education*

224. First Nations people lack knowledge and awareness of the justice system generally, and the jury system, in particular. It was understandably expressed that most First Nations individuals will refrain from participating in a process about which they know nothing. Many First Nations people were unaware that the same jury roll was used to select juries for both trials and coroner's inquests. Therefore, most leaders identified the need for a focused and sustained education strategy for First Nations communities with respect to the role of juries in the justice system and the process by which jury rolls and jury panels are created, as well as the rights of individuals accused of offences and the rights of victims.

225. In 2010, the Ministry of the Attorney General, through the Court Services Division, partnered with the Grand Council of Treaty #3 to deliver "Community Jury Awareness Forums" to fifteen Treaty #3 First Nations located in the Kenora Judicial District. The forums focused on providing outreach and education regarding the jury process. The Grand Council of Treaty #3 expressed an interest in continuing to deliver these information forums and to work with the Ministry of the Attorney General to share information and develop jury lists to address the underrepresentation of First Nations peoples on the jury roll.

226. A similar partnership among the Ministry of the Attorney General, Court Services Division and the Union of Ontario Indians was created in 2009 and 2010. Together, they hosted three Jury Information Forums for the Anishinabek First Nations, which addressed the lack of First Nations candidates on the jury rolls, ways to improve relations, cooperation and trust between Anishinabek First Nations and the Ministry of the Attorney General and Court Services, and how to increase the representation of First Nations peoples in the justice system generally. These Jury Forums appear to have many educational benefits, and the First Nations partners expressed an interest in enhancing and continuing with the Jury Forums.

227. It was also mentioned by many people that government officials, Court Services staff, and police officers who work with First Nations ought to be educated with respect to the circumstances and issues that First Nations people face on a daily basis. In addition to cultural awareness training, it was suggested that all Court Services staff who are involved with ensuring First Nations peoples are represented on the jury roll ought to be trained to undertake their duties in the most effective way possible. It was thought that a better understanding of First Nations peoples would lead to better outcomes all around.

228. Further, education with respect to the justice system in general, and the jury system in particular, needs to take into account the relative youth of the First Nations population in Ontario. As of the 2006 Census, almost half of First Nations people in Ontario were below the age of 24, and almost 30 percent were 14 or younger. In comparison, just 18 percent of Ontarians were 14 or younger, and only approximately 32 percent of Ontarians were 24 or younger.<sup>251</sup> The median age for the First Nations population in Ontario is 27.9 years, whereas the median age for the province as a whole is 38.7 years.<sup>252</sup>

<sup>251</sup> *Population by age groups, sex, and aboriginal identity groups*, online: Statistics Canada <<http://www12.statcan.ca/census-recensement/2006/dp-pd/hlt/97-558/pages/page.cfm?Lang=E&Geo=PR&Code=01&Table=2&Data=Change&Sex=1&Abor=3&StartRec=1&Sort=2&Display=Page>>. 2011 Census statistics are not yet available.

<sup>252</sup> *Aboriginal identity population by age groups, median age and sex*, online: Statistics Canada <<http://www12.statcan.ca/census-recensement/2006/dp-pd/hlt/97-558/pages/page.cfm?Lang=E&Geo=PR&Code=01&Table=1&Data=Count&Sex=1&Age=10&StartRec=1&Sort=2&Display=Page>>.



#### *(iv) Self-Government*

229. First Nations leaders resoundingly and assertively expressed the desire to assume more control of community justice matters as an element of their inherent right to self-government, and, at the very least, to be involved in developing solutions to the jury representation issue. Having been introduced to community-based restorative justice initiatives in previous years, First Nations experienced the benefits to their communities that came from the development of a culturally appropriate approach to justice. However, these programs were discontinued owing to funding cuts, and therefore will require financial resources and capacity to be resumed. First Nations leaders were unequivocal that re-introducing restorative justice programs would have multiple benefits at the community level. Such benefits include the delivery of justice in a culturally relevant manner, greater understanding of justice at the community level, increased community involvement in the implementation of justice and, finally, an opportunity to educate people about the justice system and their responsibility to become engaged on the juries when called upon to do so.

#### *(v) Policing*

230. The issue of local police services arose in many discussions throughout the engagement process. It became very clear that inadequate police services, and associated funding, contribute to negative perceptions of the criminal justice system. Many First Nations were very concerned about the limited and under-resourced police services and the lack of sufficient training for them. Some First Nations leaders expressed frustration regarding the lack of enforcement of First Nation by-laws.

## **(B) CURRENT PRACTICES FOR COLLECTION OF NAMES AND CONTACT INFORMATION OF FIRST NATIONS PEOPLE ON RESERVE ARE INADEQUATE**

231. The majority of First Nations Chiefs and Councillors I spoke to throughout the engagement process were concerned about preserving the confidentiality of band membership lists. The leaders' prevailing concern relates to their obligation to protect the privacy of their citizens. Many took the position that they were obliged to obtain the consent of their citizens before they could disclose personal information such as names, dates of birth, and addresses. Moreover, many Chiefs felt strongly that education about the jury system was a pre-requisite to the disclosure of names. They also felt it was unfair to subject their people to what they regard as a completely foreign process.

232. Chiefs also expressed confusion relating to the position taken by Aboriginal Affairs and Northern Development Canada (AANDC) (formerly Indian and Northern Affairs Canada (INAC)) regarding the disclosure of membership lists. At one point in time, INAC was advising First Nations governments to refrain from disclosing any information taken from the Indian Registry System. Recently, AANDC appears to have changed its position, choosing instead to leave the decision to disclose Band Lists to the discretion of individual First Nations.

233. Some First Nations leaders indicated that the lists sought by Court Services officials would not provide the information they were seeking. The band membership lists that are typically requested by Court Services contain the names of all citizens of that First Nation, regardless of whether they live on or off the reserve. Typically, there is no indication of the location of residency for each member. In some instances, the Court Services Division has requested disclosure of the First Nation's "Electoral" or "Voters" list. I was advised that electoral lists also do not contain the addresses of First Nations citizens. Therefore, there is no list possessed by First Nations that contains the information required by the Court Services Division for the purposes of the jury roll. Specifically, we did not learn of a First Nation possessing a "Residency" list that contains the names and addresses of First Nation citizens resident on the reserve.

234. While a residency list would be ideal for the purposes of the Ontario jury roll, it may not be practical. First Nations have stated that they would have to devote time and resources to assemble such a list. They would require financial capacity to gather and maintain appropriate, accurate and current records, including addresses of all their citizens. Some First Nations I met expressed a willingness to do this if they received funding to do so.

235. Many other First Nations leaders and individuals suggested that the participation of First Nations peoples on juries should be voluntary, particularly considering the social and economic pressures already on their communities. They expressed the view that First Nations' administrators are best positioned to explore the interest and eligibility of citizens, and accordingly, could be tasked with maintaining a First Nations jury list. They were of the opinion that First Nations would support an option whereby they would enter into an agreement with Ontario to train First Nations administrators to create and maintain lists of names of willing First Nations people for the purposes of the jury roll. From this First Nations jury roll, it was suggested that the Provincial Jury Centre could then randomly draw the names required for the distribution of questionnaires. It was thought that such an approach would be appropriate to address the representation of First Nations' reserve residents on the jury roll. In addition, I received a very practical suggestion that a First Nations person be staffed in each judicial district to work with First Nations to obtain the information required for the purposes of the jury roll.

236. It has become obvious that the process to obtain the names and addresses of First Nations people on reserve must be clear and consistent throughout all judicial districts wherein First Nations communities are situated. As suggested by a participant in the engagement process, clear guidelines in this respect should be provided to all parties charged with the implementation of section 6(8) of the *Juries Act*.

### **(C) JURY QUESTIONNAIRES POSE PROBLEMS AND CONCERNS THAT DETER FIRST NATIONS RESPONSES**

237. Many First Nations Chiefs, Councillors, and others raised issues regarding the substance of the jury questionnaire forms. First, the statement of penalty for non-response on the form provides “[i]f you fail to return the form without reasonable excuse within five (5) days of receiving it, or knowingly give false information on the form, you are committing an offence. If convicted of this offence, you may be fined up to \$5000.00, or imprisoned up to six (6) months, or both.” First Nations view both the penalty for non-response and the time limit for response as unreasonable, and more importantly, as imposing jury duty through intimidation and threat. It was often expressed that soliciting participation in the jury system by threat of fine and/or imprisonment had the reverse effect and was a strong disincentive to participate. Moreover, we are unaware of any case where an individual was fined or imprisoned or even charged with an offence for failing to respond to a jury questionnaire.

238. The second feature of the jury questionnaire to which First Nations people took considerable exception was the question regarding Canadian citizenship. While it is recognized that being a Canadian citizen is an eligibility requirement to serve as a juror, many First Nations believe very strongly, and are proud of the fact that, they are First Nations citizens. As a result, many First Nations persons who respond to the jury questionnaire answer in the negative, or would answer in the negative, to the Canadian citizenship question. This citizenship issue automatically disqualifies them from having their names entered on the jury roll. It was frequently suggested that if there were an alternative question asking if the respondent was a First Nation citizen or member, they would answer in the affirmative, and therefore not be disqualified from jury service.

239. Third, many First Nations leaders stated that Chiefs and Councillors ought to be included on the list of occupations that are exempted from jury service. It was stated that elected officials do not have the time or ability to be away from their communities and ought to be afforded the same exemption as other elected officials throughout Canada.

240. Fourth, I heard repeatedly that language poses a considerable obstacle. Requiring fluency in English or French as an eligibility requirement for jury service is problematic for many whose spoken language is their First Nation language. I spoke with many First Nations people who stated that if Ontario seeks their participation on juries, it ought to accommodate people who speak First Nations languages by equipping juries with translation services, if necessary. Moreover, the lack of translation of jury questionnaires and accompanying instructions pose challenges to First Nations people in completing the jury questionnaire forms.

241. Lastly, many First Nations participants in the engagement process expressed a lack of understanding of the jury selection process and role of juries, which in turn served as a barrier to responding to jury questionnaires. It was noted that confusion and misunderstandings often arise when a person is called for jury selection but not chosen for jury service, with no follow-up communication from the Court Services Division. It is likely that negative messages are passed to other people in the community, which potentially has an adverse impact on their future interest in responding to jury questionnaires.

### **(D) PRACTICAL BARRIERS TO JURY PARTICIPATION**

242. In addition to all of the aforementioned obstacles, there exist some very real logistical barriers that First Nations peoples, particularly in northwestern Ontario, must overcome to participate on juries. Transportation from reserve communities to the urban centres is a significant challenge in a number of ways. Travel to urban centres often requires multiple modes of transportation that can take up to several days. The cost for airfare far exceeds what people can afford out-of-pocket. While the Court Services Division in the Kenora judicial district pre-arranges travel, accommodation and meal allowances for potential First Nations jurors, my understanding is that this service is not consistently offered in other judicial districts.



First Nations leaders expressed the opinion that all expenses related to the jury selection process or jury service must therefore be paid prior to travel to urban centres because of lack of resources and available credit.

243. First Nations people also noted that accommodations and meal allowances are not adequate. It was reported that hotels were substandard and meal stipends did not allow for healthy meal options. Concerns were also raised with respect to lack of translation services for people who travel to the urban centre where their dominant language is a First Nation language. Because the jury selection process and jury services require First Nations people to be away from their communities for several days, it was noted that childcare and Elder care expenses ought to be included as a necessary expense, or preferably, children and Elders ought to accompany the potential juror on an expense-paid basis. Moreover, for those potential jurors who are employed, First Nations people felt strongly that income supplements should be available. The First Nations people, with whom I spoke who had experienced jury service, expressed the need for community-based supports, such as assistance with process logistics, as well as services for psychological impacts that may arise following jury service.



244. Finally, First Nations people identified that the existence of criminal records, and lack of awareness of pardon procedures, present a significant bar to jury service. They explained that some First Nations people have old criminal records, many for minor offences, that excuse them from being eligible for jury service. However, owing to the lack of information and costs associated with pardon procedures, most do not expunge their criminal record, choosing to live with it instead.

## **(E) CORONER'S INQUESTS**

245. The importance of coroner's inquests was emphasized by the families involved in coroner's inquests and by leaders and other people I met. Many First Nations people are dying while in state care, and a fear was expressed that the number of deaths will rise, simply by the excessive number of First Nations people in penal institutions and the child welfare system. It was explained to me that First Nations people understand, better than non-First Nations people, the systemic and historic issues that are engrained in the justice system, which often come into play in these tragedies. Therefore, ensuring the representation of First Nations peoples on coroner's juries is viewed to be integral to the proper resolution and prevention of future tragedies that involve First Nations peoples.

246. Aboriginal Legal Services of Toronto hosted a Families Forum – a gathering of family members who had been or were involved in coroner's inquests to examine the circumstances of a death while in state care. The main concerns expressed by the participants related to the composition of the juries and their lack of representativeness of any First Nations peoples, and the delays associated with the inquest. Families have been waiting for as many as five years to move forward with the inquests. Admittedly, much of this delay is associated with the lack of resolution of the issue of underrepresentation of First Nations peoples on coroner's juries. While this issue is being addressed in the courts, coroner's inquests are placed into abeyance, and the families are prevented from obtaining answers and the necessary closure in a timely manner.

247. Christa Big Canoe, Legal Advocacy Director at ALST, emphatically expressed this point: "The only thing these people ask for is fairness, not special treatment". That should be an attainable goal for everyone involved.

## (F) RELATIONSHIP BETWEEN THE MINISTRY OF THE ATTORNEY GENERAL AND FIRST NATIONS WITH RESPECT TO THE JURY ROLL NEEDS TO BE IMPROVED

248. Every First Nation individual I met unequivocally asserted that the way forward with respect to enhancing a relationship with the Ministry of the Attorney General in the context of the jury system, and all justice matters, is through a government-to-government process. First Nations want to assume greater control of the justice system as it applies to their people and communities and rely upon their traditional approaches to justice as the preferred approach. First Nations recall the restorative justice programs that were initiated in a previous era and look to build upon those as a means to reclaim authority and responsibility over the delivery of justice to their people. They strongly believe that diverting First Nations people from the criminal justice system to a traditional system of healing and reconciliation will have many benefits that will ultimately trickle down to the jury roll process. Therefore, First Nations advocate for adequate funding to support community-based justice initiatives aimed at enhancing participation on juries in a culturally appropriate manner, and to return to the implementation of First Nations restorative justice initiatives.

249. First Nations view Ontario and Canada's investment in First Nations restorative justice programs as also benefitting the criminal justice system. Consistent with a restorative justice approach, First Nations people expressed the need for collaboration between the Ministry of the Attorney General and First Nations in developing a proper jury roll selection process. A family member who attended the Families Forum, discussed above, suggested a pragmatic step in this direction; the Attorney General should host a meeting with First Nations leadership to consider ways to implement section 6(8) of the *Juries Act*. Such a meeting would signal a positive step towards improving the relationship between the Attorney General and First Nations, particularly with respect to the jury system. On a broader level, it was also suggested that the Attorney General create a "Round Table" on Aboriginal People and Justice to design, develop, and implement an Aboriginal Justice system.

250. It became abundantly clear throughout the engagement process that education and awareness among First Nations people in relation to the jury system for both trials and coroner's inquests is a priority and would serve to improve the relationship. Increased education about the process for pardons and access to support services for First Nations are required. Likewise, First Nations are insistent that increased education, including cultural sensitivity training, is also required for Court Services and policing officials regarding First Nations culture, values, and traditions.

251. In the words of former Chief Jonathan Solomon Sr. of Kashechewan, "it is up to the Attorney General of Ontario to close the 'Knowing and Doing Gap'".

## 2. MEETINGS WITH GOVERNMENT OFFICIALS AND THE JUDICIARY

252. During the engagement process for the Independent Review, my legal team and I also met and spoke with officials from the Ministry of the Attorney General, Court Services Division, the Provincial Jury Centre, Ministry of Health and Long-Term Care, the Provincial Advocate for Children and Youth, and members of the judiciary who were involved in increasing the representation of First Nations peoples on the jury roll. We obtained helpful information regarding the role of the key actors in compiling the jury roll. We also heard a consensus view among government officials that improvements are necessary to substantially increase the participation of First Nations reserve residents on the jury roll.

253. Most of the information I learned from government officials and members of the judiciary about the compilation of the jury roll in Ontario and efforts to improve the representation of First Nations persons on the jury roll has already been described by me in Part III under the sections entitled the "Jury Selection Process as it Currently Operates in Ontario" and "First Nations Representation on Ontario Juries", and I will not repeat those descriptions here.



254. As discussed in those sections, at present, the manner in which potential First Nations jurors are identified is ad hoc and contingent upon the efforts made by court staff to connect with First Nations, and ultimately the decisions of First Nations to exercise their discretion to disclose a list of reserve residents. This ad hoc system has proven to be ineffective and results in a jury roll that is unrepresentative of all First Nations peoples on reserve. Accordingly, obtaining the names of First Nations residents on reserve in each judicial district in accordance with section 6(8) of the *Juries Act* in a consistent, reliable, and uniform manner is a core problem. Equally, if not even more important to achieving a representative jury roll is identifying effective ways to encourage the participation of First Nations peoples in the jury system once adequate lists or records are obtained that provide a reliable data source for First Nations reserve residents.

255. As I described above, until 2001, the Provincial Jury Centre obtained Band Lists from the Department of Indian Affairs and Northern Development through the Indian Registry System. It is the position of the federal Department that its decision to refrain from further disclosure of Band Lists following 2000 came at the request of First Nations, coupled with a review of the information-sharing agreement between Ontario and the Department of Indian Affairs and Northern Development with regard to the application of the new *Privacy Act*.<sup>253</sup> In 2007 and 2009, the Federal Department was advising First Nations against disclosing information from the Indian Registry System to third parties.<sup>254</sup> However, it is the Department's current position that each First Nation may exercise its discretion to disclose their Band Lists to Ontario for the purposes of the jury roll.<sup>255</sup>

256. I understand that the Court Services Division has considered, but not seriously pursued, the option of obtaining names of First Nations persons living on reserve from the Ministry of Health and Long-Term Care. Officials of the Ministry of the Attorney General with whom we spoke expressed the view that using the Ontario Health Insurance Plan (OHIP) database is not an ideal option for the collection of names of First Nations people on reserve for a number of reasons. First, gaining access to the OHIP database will require legislative and regulatory change and trigger a First Nations consultation process and, hence, be a lengthy pursuit. Second, the database does not contain a First Nations identifier and therefore may not be overly helpful in identifying persons living on reserve. Third, the reliability of the OHIP data base is somewhat compromised by the existence of a relatively large number of fraudulent cards.

257. However, our discussions with officials within the Ministry of Health and Long-Term Care suggested that the OHIP database could possibly be an important additional data source of names for the jury roll. While it was acknowledged that there is no First Nations indicator in the database, searches could yield success using the proper search criteria, such as postal codes and date range. Because the new OHIP cards must be renewed, cardholders are generally required to keep their cards and information current in order to access health services. However, it was acknowledged that the proper analysis and data polling must be undertaken to test the adequacy of the search results. With respect to disclosure of information for the purposes of the jury roll, the official with whom we spoke cautioned that the Ministry would also have to explore its legal obligations in this regard. In any event, the OHIP database, coupled potentially with information-sharing agreements or memorandum of understanding, is an avenue worthy of further exploration.

258. As described above, court officials in the Kenora District, and more recently Thunder Bay, have undertaken various efforts to reach out to First Nations to obtain residence information and have undertaken programs to educate and inform First Nations communities about the jury system. A recent example, as mentioned earlier, is the initiative of the Ministry of the Attorney General, Court Services Division in the Kenora Judicial District, the Grand Council of Treaty #3, and the Union of Ontario Indians to deliver Jury

<sup>253</sup> See Exhibit D to the Affidavit of Shawn Joy, sworn on July 19, 2011, filed in *R. v. Kokopenace*.

<sup>254</sup> See Exhibits 71 and 72 (Binder 6, Tabs 27, 28) to the Affidavit of Laura Loohuizen, sworn on July 18, 2011, filed in *R. v. Kokopenace*, *R. v. Spiers*, Court File No. C49961 / C48160.

<sup>255</sup> See paragraph 14, and Exhibit 2 of the Affidavit of Allan Tallman, sworn on September 30, 2011, filed in the *R. v. Kokopenace* and *R. v. Spiers*, Court File No. C49961 / C48160.

Information Forums in a total of 15 First Nations communities in 2010 and 2011. The reports that resulted from these Jury Forums contain useful recommendations for improvements. At the Red Rock First Nation, a community person was trained and hired to undertake a door-to-door campaign to educate people on the jury process. Beginning in 2008, jury questionnaires were produced in syllabics for First Nations people fluent only in their indigenous language. In addition, a First Nations court translator and liaison person was hired in the Kenora office to provide assistance to Court Services in its outreach efforts. It is precisely these types of initiatives, among others undertaken, that are critical to provide regular and on-going education, information, and encouragement to First Nations people on reserve with respect to jury service in the effort to create the annual jury roll.

259. I was also very interested to learn of the project undertaken in Thunder Bay to construct a new Court House with an Aboriginal Hearing Room that will be a symbolic and respectful centerpiece of the new Court House. I understand that the process to conceptualize, develop, and construct the Aboriginal Hearing room has involved First Nations people and Elders from the outset and that every First Nations protocol was honoured and followed. This is an important initiative that I would hope will provide a culturally appropriate space for First Nations people to participate in Ontario's justice system, and will go some way toward beginning to ameliorate some of the problems described above.

260. It was acknowledged by all with whom we met that the key to addressing the issue of representation of First Nations peoples on juries is significant collaboration and communication between First Nations leadership and the Ministry of the Attorney General. It was stressed that solutions must be sufficiently flexible to accommodate regional circumstances and distinctions, while providing certainty of process. For example, some suggested that alternatives to jury selection process should be explored, such as a video conferencing for jury selection. It was also proposed that consideration be given to trials conducted by the Superior Court of Justice in select First Nations communities, similar to the Provincial Courts. Finally, it was suggested that Superior Court judges could be provided with discretion to require a minimum quantum of First Nations jurors for criminal trials.

## C. SUBMISSIONS

### 1. NAN SUBMISSIONS

261. NAN and its legal team were key participants in the community engagement process carried out as part of the Independent Review. Following the community dialogue sessions, NAN prepared submissions for my consideration, which are divided into six parts.

262. Part I is an introduction of NAN as a political organization and its role in the Independent Review, as previously described in this Report. In its general overview of the problem of the underrepresentation of First Nations peoples in Ontario's jury system, NAN quite rightly states that the issue "is but one symptom of a larger problem of alienation and exclusion of First Nations people within the justice system".<sup>256</sup> Addressing criminal justice in Northern Ontario has been a priority for NAN.

263. In Northern Ontario there are four judicial districts for which jury rolls are prepared: Kenora, Thunder Bay, Timmins, and Cochrane. Various First Nations associated with NAN are situated in each of these districts. NAN explains that of the 46 First Nations situated in the Kenora judicial district, 30 of them fall under NAN's organizational umbrella. Of these, I visited with the leadership and citizens of seven First Nations. In the Thunder Bay judicial district, four of the 15 First Nations are part of NAN. I also visited with First Nations in the Timmins and Cochrane judicial districts for a total of 10 First Nations associated with NAN.

<sup>256</sup> Nishnawabe Aski Nation, *First Nations and Juries Review, Systemic Submissions* (July 11, 2012) at page 1.



264. Part II of NAN's submissions describe the recent litigation in Ontario regarding the underrepresentation of First Nations peoples on the jury roll in Ontario. I have previously addressed these cases in Part II and Part III of this Report.

265. Part III of NAN's Submissions advocates for a "Charter-based approach to jury representativeness". The crux of NAN's proposal is that the approach to comply with section 6(8) of the *Juries Act* ought to focus on obtaining the proper number of First Nations peoples on the jury roll, rather than on ensuring court officials make "reasonable efforts", exercise due diligence, or possess good intentions to include on-reserve First Nations peoples on the jury roll. NAN submits that the results-based approach will require the Attorney General to address the broader systemic issues affecting First Nations peoples and the justice system, which are inextricably linked to the low response rate to jury questionnaires and ultimately the lack of representativeness of the jury roll. Moreover, such an approach in NAN's view will also foster the development of a respectful relationship between First Nations and the Attorney General.

266. NAN submits that First Nations' historic experiences with the Government's actions grounded in "good intentions" have resulted in catastrophic legal and policy developments that have contributed to the disadvantages faced by First Nations people. Therefore, the government's "good intentions" should be avoided in addressing the underrepresentation of First Nations peoples on Ontario juries. For example, they refer to the Indian Residential Schools policy, and early provisions of the *Indian Act*, which prohibited Indians from leaving reserves without the permission of the Indian Agent, prohibited Indians from hiring lawyers, and banished sacred ceremonies.

267. Part IV of NAN's submissions focuses on the practical and cultural barriers to participation on juries faced by First Nations peoples. NAN outlines eight barriers to the representation of First Nations peoples on Ontario juries, which are substantively similar to what we heard in the engagement sessions and are essentially aligned with what I have discussed in the previous section. Rather than being repetitive, I will provide a brief overview of the perspectives on these matters from NAN and the various people we met.

268. *Cultural barriers.* This first obstacle emerges from the conflict between First Nations' cultural values, traditional laws, and norms, and the Euro-Canadian principles and values that underlie the Canadian justice system. First Nations' cultural values and teachings prevent people who live by those values and teachings from judging the conduct and behavior of others, thereby instilling a strong sense of reticence to participate in juries for criminal trials. NAN quotes Chief Adam Fiddler from the Sandy Lake First Nation:

One of the reasons our people don't want to be on the jury, it goes against our values. It also goes against the Bible. There are teachings from the Bible that we cannot judge others. Also it's part of our traditional values. We cannot judge somebody. We have our own traditional ways of dealing with issues... You cannot tell someone what to do, and you cannot judge them. To judge them is wrong. The idea of sitting on the jury and judge whether what they did is acceptable or not is wrong. There is a fear of that. That is one aspect of it... On the one hand, we are arguing to be part of the jury, but our fundamental belief system is that we don't want to be part of it. We struggle with it.<sup>257</sup>

269. However, it was observed that given the non-retributive nature of coroner's inquests and the potential effect of the juries' recommendations to change policies, First Nations people would not encounter the same cultural contradiction. Joe Meekis from the Keewaywin First Nation articulated succinctly:

Coroners inquests are very important for us. We need to take part in those sessions. We have heard people talk about those cases. These cases affect our communities deeply; our kids who die in that river. I cannot express how important it is. We have to be included in those juries. That is very important.<sup>258</sup>

<sup>257</sup> *Ibid.*, at page 30.

<sup>258</sup> *Ibid.*

270. NAN representatives observed that significant changes to the justice system and its relationship with First Nations could have a correlative impact on First Nations' views regarding participation on juries.

271. *Justice system is an alien system.* First Nations people do not view the Canadian justice system as a positive presence in their lives. They view it as a foreign system of imposition that has subjugated traditional and more peaceful and culturally driven approaches to resolving conflict. First Nations view themselves as objects of the criminal justice system rather than meaningful partners and participants in it. Chief Eno Anderson of Kassibonika Lake First Nation was eloquent in his vision for a justice system that reflects First Nations' cultural norms:

Until they incorporate our principles, our understanding, our values, we won't accept it... It will feel foreign. Like a stranger coming into our community. Until we have a structure that we are part of. If we are part of it, we will support it... We want a justice system that can resolve problems, not a justice system that takes away our people.<sup>259</sup>

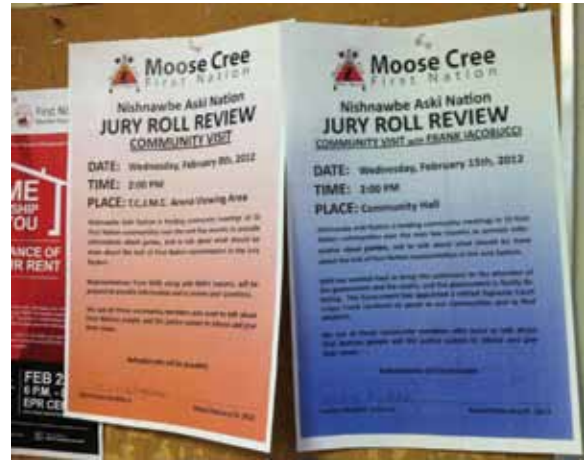
272. *Mistrust of police/authorities.* Consistently negative experiences encountered by First Nations people with respect to the police and other authorities compound their negative perceptions of the criminal justice system. This experience has a direct correlation to the lack of interest in participating in the jury system, as described by Chief Roger Wesley of Constance Lake First Nation:

That's what has to change – we have to have a fair opportunity. Fair. Fair justice would be something new to this province, because it doesn't exist for First Nations people... Take note, the system is fundamentally flawed for these people. As a leader of this community, it's tough to see young men and women being put through the process and never feeling like they had a chance.<sup>260</sup>

273. The level of mistrust is exacerbated by the directive language used in the jury forms, which is perceived as a threat of jail or fines for failure to respond to a jury questionnaire. Joe Meekis of the Keewaywin First Nation summed up a constant theme of the engagement sessions: “[w]hy stretch out your hand if you are going to hit the guy? Not a good way to ask for help.”<sup>261</sup>

274. *“Conveyor belt” for guilty pleas.* First Nations participants from community to community repeatedly identified numerous systemic and serious problems with the way in which justice is delivered in Northern Ontario, which more often than not result in guilty pleas, as described in Part IV, Section A of this Report. One citizen from Mattagami First Nation stated, “[n]ot once has [friends or family] made it to trial. They always plead guilty. Guilty, Guilty, Guilty.”<sup>262</sup>

275. There is a real perception that the justice system simply does not care about First Nations peoples and the reciprocal effect is that First Nations people refuse to participate in any aspect of the justice system. Chief Connie Gray MacKay of the Mishkeegogamang First Nation provided a powerful, yet disturbing, depiction of a typical day in court in Pickle Lake:



<sup>259</sup> *Ibid.*, at 31-32.

<sup>260</sup> *Ibid.*, at 32.

<sup>261</sup> *Ibid.*, at 33.

<sup>262</sup> *Ibid.*, at 35.

Any client who wants to talk to their lawyer, it happens in the kitchen. The judge changes in the library. The lawyers don't have a room they can interview people in, if the kitchen is full and the bar is full, so there is no privacy, no confidentiality. There is a makeshift wall inside the courtroom, so you can have a meeting there, or you are meeting alongside of the walls. It's a whole shaming process, there is no privacy for anyone... Something has to change, it's no longer acceptable.<sup>263</sup>

276. These experiences undermine respect for the judicial process and are counterproductive to enhancing jury participation.

277. *Practical obstacles to jury participation in remote communities.* The geographical and socio-economic realities of First Nations in the North give rise to significant challenges to jury participation. As discussed in Part IV, Section B of this Report, NAN maintains that these logistical and funding matters must be addressed to encourage First Nations people to participate on juries.

278. *Lack of education concerning the jury system.* Many participants in the engagement sessions were profoundly unfamiliar with the justice system in general, and the jury system in particular. Based on the accounts from First Nations people, it was equally clear that the justice system and its actors require substantial education about First Nations peoples. Following our meeting, the Kassabonika Lake First Nation provided written submissions that summarized this issue succinctly:

People are reluctant to serve [on juries] when they do not understand or trust the system... Just as there is a need for the justice system to be better informed and educated, there is a need for community education and awareness about the justice system. Elements such as the role and relationships of jurors need to be taught and understood. Information should be translated into the aboriginal language of the community; including jury notices.<sup>264</sup>

279. *Criminal records disqualify many First Nations people from participating in juries.* First Nations peoples' prior convictions represent a substantial barrier to the participation on Ontario juries; a barrier which will only increase with recent amendments to the *Criminal Code* that make it more difficult to obtain pardons to absolve a person's criminal record.

280. *Lack of respect for First Nations leadership.* The manner in which some court officials attempt to obtain band or electoral lists from First Nations is perceived as inappropriate and lacking a respectful protocol that is owed to elected First Nations leadership. An anecdote was provided of a situation in which a court official sought to obtain names from an administrative assistant after a Chief refused to disclose a list. Most, if not all, of the First Nations leaders spoke of their duty to respect and protect the privacy rights of the people they represent.

281. Part V of NAN's Systemic Submissions address the role of the Nishnawbe Aski Legal Services Corporation (NALSC) in the delivery of justice in Northern Ontario. NALSC was created in 1990 as a result of collaboration between NAN and Legal Aid Ontario to address justice issues in the North. It delivers the Legal Aid Plan in Treaty 9 and Treaty 5 territories, provides public legal education, and carries out law reform initiatives, such as restorative justice programs, in the areas of criminal and child welfare law. Its programs are funded by an array of public funders.

282. NAN acknowledges serious limitations associated with NALSC's program delivery, in that it is unable to offer the full scope of services to all NAN communities owing to funding constraints. NAN proposes that if the restorative justice programs were properly resourced, NALSC would be better positioned to meet its objective of diverting a majority of criminal matters to restorative justice, enabling First Nations

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<sup>263</sup> *Ibid.*, at 35.

<sup>264</sup> *Ibid.*, at 36.

to move towards a culturally specific justice model. NAN also proposes that adequate funding be provided for NALSC's public education mandate to help First Nations people in NAN communities understand the justice system and the role of juries therein, and to provide the support necessary to assist potential First Nation jurors in their participation.

283. In Part VI of its Systemic Submissions, NAN sets out broad areas on which, in its view, the Report of the Independent Review ought to focus its recommendations.

284. *Implementation: combating skepticism of the review process.* NAN proposes that the Report recommend the creation of an implementation process that identifies the institution or department that would carry the responsibility for implementing a particular recommendation, with measureable benchmarks within a reasonable time frame. As well, NAN proposes that a reporting mechanism be included in the recommendations to update First Nations, the public, and the courts.

285. *Ownership: enhancement of restorative justice programs.* NAN states that the way forward to reconcile competing worldviews regarding justice is to foster long-term participation of First Nations peoples in, and ownership of, the justice system. NAN proposes that this reconciliation can be achieved by creating partnerships within First Nations on self-governance and justice, and making necessary room for legal plurality and the existence of dual justice systems. The existing approach in Sandy Lake First Nation and Attiwapiskat First Nation of enabling Elders to sit with the provincial court judge has proved beneficial, despite the withdrawal of funding to support this activity.

286. *Reparations: improvements to the justice system.* NAN proposes that the government make significant investments to improve the operation of the justice system in northwest Ontario. Discussions with First Nations have exposed a system that fails at its most rudimentary level and has lost the confidence, trust and respect of First Nations people generally. NAN argues that unless the overall justice system is addressed, there is no prospect for redressing the under-representation of First Nations peoples on juries. Therefore, it urges the Independent Review to highlight the most pressing issues and propose recommendations for a process to address the basic failings of the system. NAN outlines some of these key needs:

- increased frequency of court sittings, and, in consultation with First Nations leadership, explore the feasibility of holding jury trials in remote communities;
- appropriate infrastructure for court hearings;
- adequate legal representation and a review of the Legal Aid system in the North;
- properly trained language interpreters; and
- adequate funding for the accused and their witnesses to properly access the justice system.

287. *Relationships: the creation of provincial-level infrastructure to manage the inclusion of First Nations people on the jury roll.* NAN proposes the development of infrastructure to manage a comprehensive province-wide process to include on-reserve First Nations residents on the jury roll. Such an approach will promote the implementation of section 6(8) of the *Juries Act* in a systematic and consistent manner throughout Ontario. NAN proposes that the elements of this process should include:

- affixing accountability for the implementation of section 6(8) with the Assistant Deputy Minister of the Attorney General, rather than local court officials, to ensure the appropriate expertise is used, adequate resources are committed and reporting is mandated;
- developing solutions through partnerships created that respect a government-to-government relationship; and
- collecting, analyzing, and monitoring the statistics of jury questionnaires and implementing remedial measures, as necessary.





288. *Involvement: First Nations participations in juror enumeration.* NAN recommends that First Nations governments be given the opportunity to become directly involved in juror enumeration. NAN argues that this approach would enhance the eligible return rate of questionnaires sent to First Nations and, therefore, actual representation of First Nations peoples on the jury roll. The solution to enhancing actual representation does not lie in increasing the number of jury questionnaires sent to First Nations people, but rather in outreach and self-selection of those individuals who have the ability, willingness, and capacity to serve as jurors. NAN argues that as long as a sufficient number of suitable candidates are enumerated, the fundamental principle of randomness would not be offended. NAN states that the subsequent safeguards of the out-of-court and in-court jury selection process would preempt any legal challenges of impartiality of the jury. Finally, NAN submits that any approach to enumeration should respect principles of autonomy; involving First Nations in an enumeration process must be consensual and participation of individual jurors should be voluntary.

289. *Support: ensuring the participation of First Nations peoples on juries.* During the engagement process, meeting First Nations people who served on a jury was not common. However, there were a number of individuals who received jury questionnaires. Of these people, most expressed confusion, concerns respecting the content of the forms, and fear regarding penalties for not responding. As a result of this feedback, NAN proposes five measures that are aimed at providing the necessary support to garner participation of First Nations peoples on juries.

- Public legal education should be carried out for First Nations people regarding the jury system and the role of jurors. It should be developed in consultation with First Nations governments and organizations. Likewise, an education initiative is required for officials of the Court Services Division regarding First Nations peoples and cultural and political protocols to reduce alienating interactions.
- Contact policies and practices should be renewed to transform the manner in which court officials initiate contact with First Nations with a view to soliciting voluntary participation, rather than coerced participation. Additional support resources in the form of a contact person within the Court Services Division would assist in clarifying questions regarding the process.
- Travel and income supports ought to be enhanced to alleviate the hardship of traveling. Such supports could take the form of increased financial resources or implementing video conferencing or other similar technology to reduce travel for the jury selection process. Where travel is required, a designated person from the local Court Services Division office should make all the necessary arrangements for travel. Enhanced income supports are required for matters such as childcare and Elder care responsibilities.
- Interpretation services for First Nations jurors would enhance the potential for participation. NAN also suggests amending the *Juries Act* to include a First Nations language as a qualifying criterion to jury eligibility, which would be aligned with the official languages recognized by the *Official Languages Act*.
- Exclusions based on criminal record could be addressed through an amendment to the *Juries Act* that aligns prohibited criminal offences with specific offences contained in the *Criminal Code*.

## 2. UNION OF ONTARIO INDIANS SUBMISSIONS

290. The Union of the Ontario Indians is an advocate for 39 Anishinabek First Nations in Ontario with an approximate population of 55,000 First Nations persons. The Union was incorporated by the Anishinabek Nation in 1949 and is comprised of four regional areas represented by respective Regional Chiefs.

291. We received three main groups of submissions from the Union. First, the Union provided a comprehensive set of submissions following the engagement process addressing nine areas that require improvements and advance recommendations in this regard. Second, the Union provided us with its report entitled "Juries

are a Circle of Justice”,<sup>265</sup> which it prepared following the Jury Information Forums conducted in 2009, which I described above at paragraph 226 of the Report. Third, the Union commissioned three independent papers that address the issue of the representation of First Nations peoples on Ontario juries. I briefly discuss each of these submissions below.

### (A) SUBMISSIONS FOLLOWING ENGAGEMENT PROCESS

292. The Union in its submissions identifies three prevailing messages that arose from the engagement process. First, Anishinabek First Nations are generally apathetic about becoming involved in the jury system because it is a part of a larger justice system that is perceived as foreign, unfair, and devoid of Anishinabek values and interests. Second, Anishinabek First Nations prefer to develop and implement their own justice-related institutions as a means to reduce the number of people in jail, which will in turn increase confidence in the justice system. Examples of these institutions include the police, diversion and restorative justice programs, court workers, and courts. Third, in order to encourage the participation of First Nations peoples on juries, Ontario should take steps to improve the justice system, including increasing cultural competency in the courts and providing more public education to First Nations communities on the role of juries and the associated processes.

293. *First Nations justice projects.* The Union reports that its First Nations members view the development of community justice projects as a partnership between First Nations and the justice system. In addition to diverting First Nations individuals from penal institutions and promoting healing and recovery, these projects have a positive impact on First Nations because they enable them to rebuild jurisdiction over their own affairs. On the broader scale, community justice projects reduce fear, confusion, and distaste that First Nations currently have for the justice system. Therefore, this recommendation has twin benefits of improving the relationship of First Nations and the justice system, while empowering the communities to address justice issues that affect them.

294. The Union recommends that Ontario provide additional funding and support for community justice programs and related work.<sup>266</sup>

295. *Policing.* The Union reports that First Nations police programs positively contribute to First Nations’ relationship with law enforcement. However, currently First Nations policing is a discretionary program, not secured by enabling legislation, so its existence and funding are vulnerable to elimination. The Union recommends that Ontario and Canada work collaboratively to develop First Nations Policing legislation, or preferably, fund First Nations to develop their own policing laws.

296. The Union submits that certain tangible measures should be taken to improve First Nations police services and enhance public confidence in their delivery. First, it suggests that a regulatory body be established to oversee the operation of First Nations law enforcement programs. Second, because there is currently no mechanism to review inappropriate conduct, the Union proposes the creation of an independent review board to adjudicate complaints. The Union suggests that the Office of the Independent Police Review Director could be involved in this initiative. Finally, it recommends that OPP officers receive mandatory cultural competency training, including in the areas of First Nations’ rights, laws, and by-law enforcement.

297. *Health.* The Union’s Women’s Council hold strong beliefs that the overrepresentation of First Nations peoples in Ontario jails is largely attributable to health issues generated over the years by the historic injustices endured by First Nations peoples. They propose that health supports be available both inside and outside of penal institutions to those offenders who require it. Specifically, the Union recommends that Ontario increase funding to First Nations administrations for programs and services to address physical

<sup>265</sup> Union of Ontario Indians, *Juries are a Circle of Justice – Report on the Ontario Jury Information Forums Conducted Within the Anishinabek Nation, November 2009 to February 2010* (Spring 2010).

<sup>266</sup> Union of Ontario Indians, *Submissions on Behalf of the Anishinabek Nation to the Iacobucci Review*, at page 5.



and mental health issues. It also recommends that provincial penal institutions increase rehabilitation services available to offenders while in custody and during the parole process, and suggests that these services be monitored by a civilian oversight committee.

298. *Education.* The Union states that informing and educating First Nations people on justice matters generally, and the jury system specifically, will dispel many misunderstandings and encourage First Nations people to participate in the jury process. The Union recommends that educational efforts be creatively designed and implemented in collaboration with tribal councils, Provincial Treaty Organizations or other regional organizations. To specifically target youth, the Union proposes that Ontario and Canada develop a school curriculum regarding the justice system, including the jury process as it relates to First Nations peoples living on reserves.

299. The Union also emphasizes the importance of clarifying the privacy issues concerning disclosure of electoral lists or other information regarding band membership, and sharing this information with First Nations leadership.

300. *Racism and special circumstances.* Many First Nations individuals believe that racist misconceptions and assumptions permeate the justice system – from policing to courts to the penal institutions. As one measure to address these issues, the Union recommends the implementation of mandatory cultural competency training for police, court workers, Crown prosecutors, prison guards and employees, the Office of the Children's Lawyer, and Children's Aid Society workers. The Union also recommends that consideration be given to incorporating into the criminal justice system the opportunity for a First Nations accused to raise special circumstances – as currently provided during sentencing in accordance with the Supreme Court of Canada's *Gladue* decision – prior to sentencing and as early as his or her first court appearance.

301. *Juries.* To instill greater confidence in the justice system and increase the willingness of First Nations people to participate on juries, the Union proposes that Ontario make concerted efforts to increase the number of First Nations judges appointed to the bench, especially to appellate courts. The Union also recommends that the Attorney General investigate alternatives to the current system that allows potential jurors to be removed by a challenge for cause, challenges which may be sometimes motivated by racist intent.

302. *Travel and expenses.* The socio-economic conditions of most First Nations reserves, the great distance between reserves and courts locations, and the in-court jury selection process are serious disincentives and barriers to jury participation, particularly for a lengthy jury trial. To alleviate some of these obstacles, the Union recommends a drastic increase in the compensation rates for jurors, including those who are required to appear for selection but are excused. Concurrently, the Union proposes that the Attorney General explore options to convene court proceedings on First Nations reserves, where possible.

303. *Options for improving and updating jury rolls.* Although some First Nations people appreciate their civic duty to serve on juries, encouraging Chiefs and Councils to share information with Court Services is the challenge. In recommending a variety of options, the Union stresses that a "one size fits all" approach is not an appropriate way to obtain lists from First Nations. The Union recommends the consideration of an "opt in" process whereby individual First Nations people would volunteer to serve. The Union also suggests including an ongoing plebiscite on the electoral ballots cast by individual voters that poses a question as to whether the community agrees to share their membership or residency list. Finally, the Union again suggests that juror compensation be increased to serve as an economic inducement to an otherwise impoverished demographic.

304. *Coroner's inquests.* The fact that a jury for a coroner's inquest is selected from the same jury roll as juries for criminal trials is something that is unknown to most people who participated in the engagement process. This type of information could motivate First Nations leadership to disclose Band Lists and to work with Court Services to ensure that coroner's inquests into First Nations deaths are convened in a timely manner. An assertive educational campaign would serve to inform First Nations leadership of the benefits of disclosing lists for the preparation of the jury roll. The nature of a coroner's inquest is also a motivating factor for potential First Nations jurors, who would see it as an opportunity to take part in making recommendations for change.

305. The Union recommends that Ontario educate First Nations Chiefs and Councils regarding the importance of jury rolls generally, and the representation of First Nations peoples on coroner's inquests specifically. It suggests that Ontario partner with tribal councils and PTOs in their education efforts to maximize effectiveness. It also suggests that Ontario consider separating jury rolls for criminal trials and coroner's inquests to ensure the participation of First Nations peoples in the latter.

## **(B) SUBMISSIONS FOLLOWING JURY INFORMATION FORUMS -- "JURIES ARE A CIRCLE OF JUSTICE"**

306. As previously explained, the Union partnered with the Ministry of the Attorney General in 2009 to deliver Jury Information Forums to the First Nations associated with the Union. Following those Forums, the Union prepared a report that contained the following recommendations.

### **Ways to increase the number of First Nations jurors**

- For the purposes of the jury roll, the Anishinabek Nation and Ministry of Attorney General should negotiate an agreement to develop a process to obtain Band Lists and establish protocols for the use, protection and storage of the information.
- Organize Jury Information Forums in all 40 Anishinabek First Nations.
- The Ministry and the Anishinabek Nation should work collaboratively to develop a promotional strategy for dissemination of information regarding the jury process.
- Create the position of Anishinabek Nation Sheriff, or a similar role, who would liaise with First Nations and compile the jury roll.
- Develop a distinct process for the selection of First Nations jurors within which First Nations would be charged with selecting potential jurors for the jury roll.

### **Procedural Recommendations**

- Develop a jury summons form specific to Anishinabek First Nations and produce it in the First Nations languages of Odawa, Ojibway, Delaware, Pottawatomi, Chippewa, Algonquin and Mississauga.
- Provide translation services in the First Nations languages.
- Remove the references to penalties for non-response on the jury form.
- Provide an option to identify First Nations citizenship on the jury form.
- Remove the requirement for Anishinabek jurors to swear an oath on the Bible or take an oath to be a juror.
- Provide nominal remuneration for jury duty.
- Provide for travel expenses for all potential jurors who are required to attend the selection process, regardless of whether they are selected for duty or reside within a certain radius of the courthouse.
- Provide culturally appropriate aftercare treatment for jurors who require it.

### **Ontario Justice System**

- Provide information and assistance to those First Nations citizens who want to obtain a pardon for past criminal offences.

- Appoint a liaison person to work with Anishinabek First Nations to provide information about the Ontario justice system and to provide support for jury summons forms and related documentation.
- Enhance funding for the Aboriginal Court Worker program and First Nations justice workers to support offenders.

### (C) INDEPENDENT PAPERS COMMISSIONED BY THE UNION

307. *Paper by Elder Ernie Sandy.* In his paper, “Recommendations from First Nation Citizens in Ontario Justice System”, Elder Ernie Sandy interviewed many First Nations people and made recommendations based on what he learned.<sup>267</sup> The views he heard reflected the recurring theme that First Nations people were uninterested in serving on juries because their experiences and perceptions of the justice system were pugnacious, negative, colonial and contrary to their core cultural beliefs. That being said, he stated that some expressed curiosity towards the jury system. Mr. Sandy made the following recommendations.

#### Education and Outreach

- Develop outreach programs regarding the jury selection process to be delivered in First Nations communities by First Nations justice workers. The focus of these programs should be to educate First Nations citizens about the importance in serving on a jury and could be promoted with the use of a slogan. For example, “You can make a difference in someone’s life as a jury member”.
- Develop a comprehensive “First Nation culture and historical awareness” sensitivity program delivered, with the assistance of Elders and guest speakers, to key personnel and justice lawyers who work closely with First Nations citizens.
- The Attorney General’s office should host a conference on the jury system that is aligned with the timing for major political gatherings in the province.
- Produce a video that explains the jury system in a First Nations context and emphasizes the importance of participation, to be used as an education tool in schools and for the purposes of informing First Nations people generally.
- Encourage “kitchen table” dialogue between court workers, leadership, and First Nations community members with an emphasis that no formal education is required to sit on a jury.
- Create a juror orientation program to prepare individuals for the jury selection process.

#### Accessibility

- Encourage First Nations citizens to actively pursue their right to sit on a jury, even if excluded through the selection process.

#### Eligibility

- Request a list of the names of eligible First Nations individuals from the federal department of Aboriginal Affairs and Northern Development.

#### Relationship Building

- Establish a First Nations citizen advisory body within the Attorney General’s office. Through this process, mutual admiration of each other’s professional, cultural and personal qualities can be fostered.

<sup>267</sup> Ernie Sandy (Traditional Teacher, Elder), *First Nation Citizens in Ontario Justice System* March 23, 2012.

308. *Paper by Elder Mike Esquega Sr. (Northern Superior Regional Elder)*. The central message of Mr. Esquega's submission is that improvements to the justice system for Anishinabek citizens may increase their willingness to participate in the jury system.<sup>268</sup>

309. Mr. Esquega recommends that Ontario develop and implement an action plan to acknowledge, support and provide accommodations for First Nations people to participate in the jury process. This plan should include the following elements:

- a process to educate and consult with First Nations individuals when they are subpoenaed to the jury selection process;
- the use of ceremony in the court process, including jury selection;
- consideration of a minimum mandatory number of First Nations citizens (or a full panel);
- a support system for those attending the selection processes;
- oversight of the selection process to ensure its fairness; and
- provisions to respond to financial and cultural concerns, such as considering holding court in the community of an accused person or a neighbouring First Nation.

310. Mr. Esquega also recommends that Ontario enter into a Protocol Agreement with First Nations to ensure that continuous and meaningful consultations occur with First Nations with respect to changes to the justice system, and that an educational campaign be implemented. He recommends that the consultations to be held with Chiefs and Councils, as well as with citizens, through forums provided by the Union of Ontario Indians and other organizations, and that the consultations should include women, youth, and elders, and produce a discussions paper for review by the First Nations and government officials.

311. *Paper by Karen Restoule*. For her paper "Recommendations from Jury Roll Selection – Problems or Symptom?", Ms. Restoule interviewed individuals from 15 First Nations regarding the criminal justice system and the jury process.<sup>269</sup> The dominant theme of these interviews is consistent with what I heard throughout the engagement process – that there is a profound mistrust of, and alienation from,

a criminal justice system that is perceived to be contrary to Anishinabek original jurisdiction over justice matters and devoid of Anishinabek legal principles or cultural values.

312. Ms. Restoule proposes that existing Community Justice Programs delivered by First Nations organizations in a culturally appropriate manner in 23 First Nations communities should be expanded to other areas of the justice system, including criminal trials for summary, hybrid, and indictable offences, as well as coroner's inquests. She also proposes the creation of a model of justice based upon the American Tribal Courts as a process of reconciliation for the application of common law and Anishinabek Nation legal principles. Alternatively, Ms. Restoule suggests incorporating Indigenous legal principles into the criminal justice system as a means to encourage the participation of First Nations peoples on juries.

313. Ms. Restoule's recommendations specific to the jury system include:

<sup>268</sup> Mike Esquega Sr. (Northern Superior Regional Elder), *Anishinabek Jury Selection Process*, 2012

<sup>269</sup> Karen R. Restoule, *Jury Roll Selection – Problems or Symptom?*, March 23, 2012.





## First Nations Legal Principles

- traditional legal principles of the Anishinabek Nation should be incorporated within the jury system, and the justice system as a whole, particularly when Anishinabek citizens are involved.
- a feast and/or relevant ceremonies should be held when any citizen of the Anishinabek Nation is involved in criminal or civil trials, whether as an accused or a victim.

## Partnership with First Nations

- Anishinabek Nation leadership should be included in the development and implementation of any recommendations regarding the jury roll selection process and/or justice system stemming from this Independent Review.
- Elders should be included in any legal process involving a citizen of the Anishinabek Nation.
- Elders should be consulted regarding their role and level of participation within criminal or civil trials and coroner's inquests.
- an ongoing relationship should be maintained between the Ministry of the Attorney General and the Anishinabek Nation.
- meetings and ceremonies should be held every year to reaffirm commitments between the Ministry of the Attorney General and the Anishinabek Nation, allowing for amendments to be made to the processes and trust to be built over time.

## Resources

- adequate resources should be provided to citizens of the Anishinabek Nation attending jury duty. Further, criminal or civil trials and coroner's inquests should be hosted within Anishinabek Nation territory to reduce costs substantially.
- adequate resources should be provided to accommodate the families of the individuals attending jury duty.
- resources should be provided to implement the recommendations stemming from this Independent Review.

## Education

- training should be provided for all individuals working within the justice system, including the judiciary, legal, and administrative staff, and such initiatives should be developed and delivered in partnership with the Anishinabek Nation.
- there should be public legal education initiatives targeted towards First Nations peoples and youth that seek to create awareness of the role of juries. These initiatives should be developed and delivered in partnership with the Anishinabek Nation and local school boards. The distinctions between a criminal or civil jury versus an inquest jury should be emphasized in the materials.

## Accessibility

- where possible, criminal or civil trials and coroner's inquests should be held within the First Nation of the accused or victim, or within the Anishinabek Nation territory.
- where it is not possible to host the legal process within the Anishinabek Nation territory, the process should be made available to the First Nations involved via videoconferencing and resources for necessary equipment should be provided to First Nations of the Anishinabek Nation.

## Language

- translation and interpretation services should be made available to all First Nations individuals selected to participate on a jury, as well as the families affected by the trial or inquest, including instances where video-conferencing is employed.

## Eligibility

- the Canada and Ontario citizenship criteria for jury roll selection should be reconsidered. Many First Nations individuals do not identify as citizens of these jurisdictions.
- the criteria of having no prior criminal record should be reconsidered.
- the eligibility requirements for serving on a criminal or civil jury should differ from those for a coroner's inquest.

## Outreach Strategy

- an outreach strategy should be developed and delivered in partnership with the Anishinabek Nation, in order to ensure that materials are culturally appropriate.
- there should be an outreach strategy specifically geared towards engaging First Nations youth. It is important to ensure this strategy is "catchy."

## 3. CHIEFS OF ONTARIO SUBMISSIONS

314. In a letter dated June 4, 2012, former Ontario Regional Chief Angus Toulouse submitted his thoughts and recommendations for changes to the current process for the assembly of the jury roll in Ontario, as it relates to First Nations peoples. Former Chief Toulouse recognized the importance of the Independent Review and pledged his full support.

315. The primary theme of the submissions of the Chiefs of Ontario, like that of others who have participated in this process, is that the encouragement of participation of First Nations peoples in the court system must be accompanied by the broader objective of eradicating systemic discrimination in the justice system. The Chiefs of Ontario cite several examples that they view as symptomatic of the ways in which the Canadian justice system is currently failing First Nations peoples through the subversion of First Nations legal traditions and customs and the failure to reconcile the Canadian legal system with First Nation legal principles and traditions.

316. The Chiefs view Canadian child welfare law as incongruous with the First Nations concept of the family unit, as it causes the relocation of many First Nations children. They raise the issue of inadequate attention given to the preparation of *Gladue* reports (pre-sentence reports) by probation officers. The Chiefs state that, rather than provide the proper context to determine an appropriate sentence, probation officers often perform a disservice to First Nations offenders because their reports are written with a Eurocentric bias. They also describe how traditional healing circles have essentially become sentencing circles that impose conventional criminal procedures and sentences, contrary to the healing attributes that First Nations seek. They describe the use of criminogenic risk assessments that are designed to assess the risks of reoffending, asserting that these reports are often used by the Crown in criminal proceedings as a tool to establish that First Nations offenders are at a high risk of re-offending. The Chiefs of Ontario argue that these reports create a bias against First Nations offenders by failing to consider the specific cultural context of the offender's background.

317. The Chiefs of Ontario address the issue of the collection of names and addresses of on-reserve residents for the purposes of jury questionnaires. With respect to the option of drawing upon Ontario Health Insurance Program information as a source of names and addresses for on-reserve First Nations peoples, the Chiefs of Ontario argue that this data source, if used alone, would not capture all on-reserve First Nations peoples, as they note that many First Nations peoples in remote communities do not have health cards. In any event, they observe that simply identifying the ideal data source will not necessarily result in a higher response rate to jury questionnaires due to the broader systemic issues that have engendered a deep mistrust by First Nations peoples of the justice system.

318. The Chiefs of Ontario recommend that the Attorney General's office include designated First Nations officials to address First Nation issues and intergovernmental relations. These positions, appointed to serve each treaty region or judicial district, could be mandated to collect information from the First Nations within the delineated regions and to maintain relationships with First Nations on justice matters and judicial services.

319. The Chiefs of Ontario advance four specific recommendations with respect to the jury forms:

- **Citizen v. First Nations:** It is recommended that the jury forms include a question relating to a person's citizenship of a First Nation. It was explained that some First Nations do not relate to Canadian citizenship and often do not possess evidence of such.
- **encourage First Nations members to complete and submit forms:** It is recommended that both the Province of Ontario and the Federal Government work collaboratively with First Nations Governments, regional organizations or tribal councils to fund and provide an educational program that targets youth, designed to inform them of their legal and civil rights and duties within the Canadian constitutional and common law framework.
- **exemption from jury service:** It is recommended that Elders be exempted from jury service so that their traditional role and cultural integrity in the community is preserved.
- **translation services:** Increased and adequate translation services could help to encourage First Nations peoples to participate as potential jurors.

320. The Chiefs of Ontario maintain that the paramount factor for increasing the participation of First Nations peoples in the jury system is the recognition and accommodation of First Nations legal traditions and cultural differences. In addition, they identify two practical barriers to the participation of First Nations peoples on juries that require particular attention: the payment of transportation, accommodations and meals by the Ministry of the Attorney General; and the provision of support services to enable First Nations individuals to complete jury forms, attend at a trial or coroner's inquest, and deal with post-jury duty psychological effects.

321. The Chiefs of Ontario conclude their comments by reinforcing the need for a respectful government-to-government relationship between First Nations and the Government of Ontario as a means to address the systemic issues plaguing the criminal justice system.

#### 4. ABORIGINAL LEGAL SERVICES OF TORONTO SUBMISSIONS

322. Aboriginal Legal Services of Toronto (ALST) is a multi-service legal agency that has served Toronto's Aboriginal community for over 21 years. This organization has gained substantial experience through the representation of Aboriginal clients in coroner's inquests, inquiries, criminal litigation, and advocacy to ensure Aboriginal clients receive equitable treatment in and access to the justice system. In particular, ALST has been actively involved in litigation that has considered and is considering the issue of the representation of First Nations peoples on juries.

323. ALST frames the issue of jury representativeness as one of fundamental justice, which they assert is being breached by the lack of representation of First Nations peoples on the jury roll. As a general proposition, ALST is of the view that the issue of jury representation arises from the failure to fulfill the obligations demanded by section 6(8) of the *Juries Act*. They note that there is no consistent source list from which to draw on-reserve First Nations names, nor have sufficient efforts been made to ensure the jury roll is properly representative of First Nations peoples.

324. ALST asserts that First Nations people who reside on a reserve have the right to be considered for jury duty and that a properly representative jury is particularly important for Aboriginal accused persons in the criminal justice system. They note that systemic discrimination against Aboriginal people in the criminal justice system has been most recently affirmed by Canada's highest court in *R. v. Ipeelee*<sup>270</sup> and that an accused person being tried by a jury that is drawn from an unrepresentative jury roll potentially faces discrimination under section 15 of the *Charter*.

325. ALST addresses the connection between the historic exclusion of Aboriginal people from the Canadian justice system and the underrepresentation of on-reserve First Nations peoples on the jury roll. It notes the correlation between the overrepresentation of Aboriginal people in the penal systems and their exclusion from participation in the Canadian justice system, arguing that the latter is a factor that contributes to the excessive imprisonment of Aboriginal peoples.

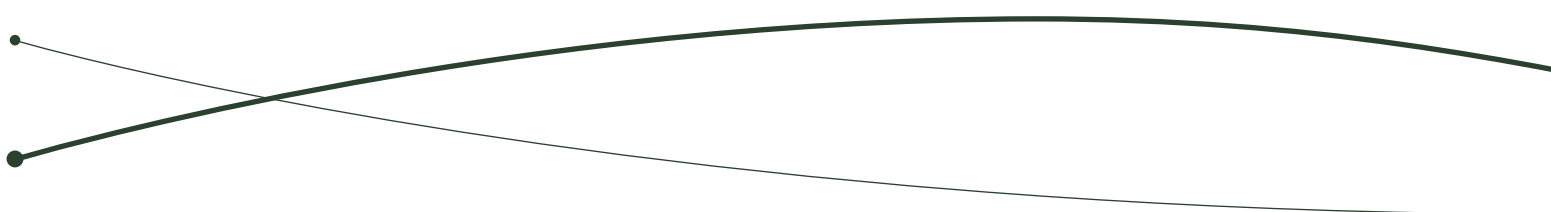
326. ALST also addresses the connection between the coroner's process and the jury roll issue. Because the number of Aboriginal peoples in the penal system is unrelenting, thereby increasing the probability of deaths that will occur while in custody, coroner's inquests are of growing importance. Ensuring that inquest juries represent the Aboriginal population is integral to remedying the circumstances by which such deaths occur through a proper understanding of the historic, cultural, and contemporary contexts.

327. Following its review of recent litigation respecting the issues of representation of First Nations peoples on juries, ALST states that using Band Lists is not the most effective manner in which to ensure that First Nations peoples are represented on the jury roll in Ontario. They take this position for a number of reasons. First, ALST draws the distinction between those First Nations that control and administer their own membership lists and those First Nations that have chosen to leave their membership lists to be maintained by Aboriginal Affairs and Northern Development Canada (AANDC). Of those First Nations that have regained control of their membership lists, they will have to consider the privacy interests of their members in deciding upon disclosure, just as AANDC must consider privacy issues. Those First Nations that have left their lists with AANDC rely on the federal Department to address this matter. Finally, ALST argues that band members ought to be involved in the decision-making that will, in effect, determine whether band members will participate in the jury system.

328. ALST questions the lack of consistency with respect to Ontario's efforts to comply with section 6(8) of the *Juries Act*. ALST contends that Ontario failed to assess the impact of the Supreme Court of Canada's decision in *Corbiere v. Canada*, preventing Court Services personnel from appreciating that the lists they relied upon likely contained names, without distinction, of First Nation citizens who reside off the reserve. Referring to the evidence of actions taken by local Court Services officials in the Thunder Bay and Kenora judicial districts to comply with section 6(8), ALST submits that the exercise of local authority and discretion within Court Services is not the appropriate means to address the representation of First Nations peoples on the jury roll.

329. In looking forward at ways to remedy the current problems of lack of representation of First Nations peoples on Ontario juries, ALST recommends Ontario follow the Manitoba model, under which, as I noted at paragraph 154, names of all Manitoba jurors are selected by data drawn from the provincial health

<sup>270</sup> *R. v. Ipeelee*, 2012 SCC 13.



registry. ALST notes that the Manitoba Justice Inquiry, to which I have also referred to at paragraph 154, found that this approach adequately addressed the representation issue, with the exception of Winnipeg, though no explanation for this exception was given.<sup>271</sup>

330. ALST makes a number of recommendations, categorizing them as either long term or interim activities. The recommendations are as follows:

### *(i) Long term Recommendations*

#### **General**

- creation of a map that depicts judicial districts and the First Nations communities situated within them.
- clear and concise directives to regional Court Services offices in relation to:
  - » standards of communication and outreach to First Nations communities and peoples;
  - » recruiting First Nations staff in regions where there is a high percentage of First Nations population;
  - » human resource policy on hiring, retaining and promoting First Nations employees within the Court Services Division; and
  - » a policy that prioritizes the representation of First Nations peoples on the jury roll within the Court Services Division and Coroner's Office.
- mandatory training for Sheriffs to familiarize them with the composition, political and cultural attributes of the First Nations in their respective judicial districts.

#### **Training**

- aboriginal cultural competency training for Court Services staff, Coroners and their counsel that includes general information about each First Nation, history of exclusion, overrepresentation and incarceration, inquest issues, cultural and lived experiences:
  - » developed by or with First Nations
  - » adequately funded
  - » sustainable and transferrable; and
  - » regularly updated.
- communications training for staff of the Court Services Division and Crown lawyers.

#### **Relationships**

- strategic outreach to First Nations leadership, tribal councils, political and territorial organizations, Aboriginal service agencies and women's groups.

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<sup>271</sup> Public Inquiry Into the Administration of Justice and Aboriginal People, *Report on Aboriginal Justice Inquiry of Manitoba*, Vol. 1 by A.C. Hamilton & C.M. Sinclair. (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991) online: The Aboriginal Justice Implementation Commission <<http://www.ajic.mb.ca/volume1/toc.html>> at chapter 19.

## Coroner's Services

- outreach to First Nations governments and communities to explain the importance of representation on inquest juries.
- regional and investigative coroners should meet with First Nations governments and political organizations regarding juries.

## Legislative Changes

- research approaches from other jurisdictions that address First Nations access to justice and inclusion on the jury roll, the results of which should guide legislative change.
- create an equal system for all jurors.
- as an alternative to legislative change, Ontario should seek to enter into a Memorandum of Understanding with Aboriginal Affairs and Northern Development for the provision of annual lists from the Indian Registration system of First Nations reserve residents.

## Outreach

- an implementation committee should be created that includes First Nations governments and agencies from each judicial district that contains First Nations reserves.
- a public awareness campaign should be designed in consultation with First Nations peoples directed at the general public and legal professionals.
- Ontario should sponsor a Continuing Professional Development course certified by the Law Society of Upper Canada that addresses the representation issue.

## *(ii) Interim Recommendations*

### Court Services Division and Sheriffs

- training should be provided to all Sheriffs and court staff that are involved in implementing section 6(8) of the *Juries Act*. Training should incorporate a historical overview, information on First Nations governance systems, the impact of the *Indian Act* on Band Lists and voters lists, and cultural competency and communication training appropriate for dealing with First Nations peoples.
- changes should be made to the jury manual to set out a specific protocol regarding engagement with First Nations for the implementation of section 6(8).
- Court Services staff should make efforts to build relationships with First Nations communities, tribal councils and political and territorial organizations as part of a robust communication and outreach strategy.

### Inquest Recommendations

- In the case of an unrepresentative jury roll, the Coroner should make direct efforts to communicate with the victim's family to explore whether they want to proceed in any event of the existing jury roll, rather than unnecessarily delaying the inquest.
- The Coroner should explore what steps can be taken to implement a representative jury on a case-by-case basis, similar to what the Court of Appeal recommended in *Pierre v. McRae*, which was to order the sheriff to produce a list of jurors from a proper jury roll.





## 5. SUBMISSIONS OF THE OFFICE OF THE PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH

331. The Provincial Advocate for Children and Youth made submissions respecting a role for First Nations youth in the jury education process. The Provincial Advocate is an independent officer appointed by the Legislative Assembly of Ontario. His mandate is to “provide an independent voice for children and youth and partner with them to bring issues forward; encourage communication and understanding between children and families and those who provide them with services and; educate children, youth and their caregivers about the rights of children and youth.” As part of his mandate, the Provincial Advocate works for the rights and interests of First Nations children and youth.

332. By way of context, the Provincial Advocate notes that First Nations peoples currently represent 16.7 percent to 19.7 percent of the prison population in Canada, while they represent only four percent of the overall Canadian population. According to the Provincial Advocate, these statistics are likely to worsen over the coming decade, and Ontario already has the third highest incarceration rate in Canada. It is the view of the Provincial Advocate that Aboriginal youth are almost eight times more likely to be in custody compared to their non-Aboriginal peers.

333. The socio-economic challenges faced by Aboriginal youth create a dire picture that begs for transformative changes to the justice system if First Nations peoples are to participate in the jury process. The Provincial Advocate explains that gang involvement, high rates of suicide, contact with the youth justice system, unemployment and underemployment, lack of education, history of physical and sexual abuse, and over-policing are matters that in one way or another burden the life of an Aboriginal youth. Accordingly, it is imperative that First Nations youth be involved in creating solutions to the jury system to counter the overrepresentation of First Nations peoples in the justice system and to lend their experience to address prevention approaches and alter perceptions that bar willingness to participate on juries.

334. In preparing his submissions, the Provincial Advocate’s office recruited a group of First Nations youth with whom it had previously worked to seek their perspectives and opinions regarding potential reforms aimed at inclusion of youth in the jury process. The Provincial Advocate’s office expressed a commitment to move forward with its recommendations that focus on educational processes to address the systemic barriers to First Nations youth and their communities insofar as participation on juries is concerned.

335. The Provincial Advocate identifies an initial challenge in working with First Nations youth in a reform process that he describes as needing to overcome a “confidence deficit”. Many First Nations youth have come to feel apathetic towards the “system” because the government has failed to provide the most basic of services, like clean water, health care, food security or safe housing. Coupled with the historical wrongs committed by government in relation to First Nations’ culture, language, loss of land, racism, discrimination and other injustices, many First Nations youth feel disempowered to effect any sort of change.

336. Also contributing to the confidence deficit is the pattern of exclusion of First Nations youth from decision-making regarding matters that affect their lives. Such exclusion serves to undermine their confidence in their own ability to make sound decisions. The confidence deficit effectively impedes motivation on the part of First Nations youth to become involved in reformative change. However, according to the Provincial Advocate, with the necessary supports, this challenge is manageable.

337. The Provincial Advocate suggests a number of ways to empower First Nations youth to willingly participate in changing the system to better serve their rights and interests. First, youth must come to understand and appreciate that they possess certain definable rights by virtue of being First Nations citizens, as well as citizens of Ontario and Canada. The Provincial Advocate’s office states that given its role in rights education, it is well-positioned to act as a resource for First Nations youth as they advocate for change in Ontario’s Justice System.

338. The Provincial Advocate advances the concept of civic engagement as an effective framework to explain an individual's obligation to the jury process. Educating First Nations youth about how they can contribute to their community in a meaningful way by applying their lived experiences can be an effective way to instill motivation for active community engagement. The community is strengthened by maximizing the number of youth that are taught the importance of civic engagement, in the context of First Nations' cultural values and norms. Once seen in that context, First Nations youth can then apply this concept to the broader community and, in particular, the jury process.

339. The Provincial Advocate stresses the importance of the *Gladue*<sup>272</sup> case and the principles espoused therein as a tool to entice young people to become active in the reform process. Ensuring that the *Gladue* principles are properly applied to Aboriginal offenders is a way in which First Nations youth can positively exercise their civic engagement. Moreover, sentencing options available through the application of the *Gladue* principles present an opportunity for young people to learn about their First Nation's traditional laws, values, and approaches to the restoration of harmony and justice and how that can be applied in a daily setting. Being involved in a community's restorative justice process can be an invaluable teaching tool that demonstrates the resolution of conflict and the return to harmony. This is a positive exercise of the justice system. The Provincial Advocate asserts that any systemic reform of the justice system must be based upon the *Gladue* principles. Reforms must be focused on remedying the overrepresentation of First Nations peoples in prisons and the circumstances by which the lives of First Nations peoples are the subject of coroner's inquests.

340. As a first step, the Provincial Advocate recommends initiating a discussion that brings together First Nations youth to strategize on the development and delivery of jury education workshops. He further recommends that a strong mentorship relationship be fostered between Justice officials and First Nations youth to reinforce the commitment to move towards systemic change.

341. Specific recommendations proposed by the Provincial Advocate include:

- First Nations young people be brought together so that they can share their knowledge, questions and concerns about Ontario's justice system and be educated regarding the role of the jury process in improving the conditions that influence the delivery of justice to First Nations peoples.
- the Provincial Advocate's Office work in partnership with First Nations youth, communities and leadership to develop recommendations that are specific to what is needed to create a justice system that is fair and just in their eyes and anchored in their rights under the United Nations Convention on the Rights of the Child.
- First Nations young people be provided with the opportunity to work with their Elders, the Provincial Advocate's office and the justice system to create a mentorship model that encourages the participation of youth in the jury process.
- young people be provided with an opportunity to work with the Provincial Advocate's office to develop educational activities, and participate in a process to help develop a systemic policy framework to transform the jury process. Early education is a key strategy to ensure that young First Nations people are informed of how jury service can contribute to delivering justice for First Nations people.
- a review of the current jury recruitment and selection process be conducted to identify the barriers for First Nations young people and adults and changes that are necessary to promote involvement in jury service that is aligned with a cultural approach to civic engagement.

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<sup>272</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688.

- the province develop simplified educational materials on the jury and court process and a provincial outreach and education program that links the importance of community involvement and participation on the jury process to the development of justice models that are reflective of the values and traditional healing approaches of First Nations communities, built upon the *Gladue* principles.
- a social indicator lens be applied to identify the barriers that must be addressed in developing processes and education approaches. More must be done to understand the impact poor education, substandard housing, lack of economic opportunity, and violence play in hindering the participation of First Nations young people in the jury process.

## 6. SUBMISSION OF LEGAL AID ONTARIO

342. By letter dated July 30, 2012, Legal Aid Ontario provided a submission for my consideration regarding its Aboriginal Justice Strategy. Generally, Legal Aid Ontario recognizes the importance of enhancing access to justice for Aboriginal peoples; a fact reflected in the development of its Aboriginal Justice Strategy.

343. The submission begins by providing the background of Legal Aid Ontario, which explains that it has been in existence since 1998 pursuant to the *Legal Aid Services Act* as an independent yet publicly-funded non-profit corporation that provides legal services to low income people in Ontario.<sup>273</sup> With respect to criminal cases, it is only authorized to provide assistance where there is a strong likelihood that the accused may incur a sentence of incarceration.

344. Legal Aid Ontario's 2008 Aboriginal Justice Strategy was born out of a consultative process engaged with Aboriginal people and service organizations in Ontario. The goals of the strategy are to improve services to Aboriginal people by removing barriers to accessing justice, including Aboriginal people on its management team, increasing Aboriginal legal representation, and improving services to the Aboriginal community. To meet these goals, Legal Aid Ontario establishes annual initiatives to improve their services, which has included ensuring that legal counsel who are assigned legal aid work for Aboriginal people comply with mandatory professional standards particular to Aboriginal law and the relevant factors in keeping with the *Gladue* decision and the preparation of *Gladue* Reports.

345. Legal Aid Ontario provides statistics that indicate that ten percent of the certificates given to legal aid applicants were issued to those who identified as Aboriginal. Moreover, between 11 percent and 15 percent of Legal Aid certificates for criminal matters, youth criminal matters and child welfare matters are issued to Aboriginal people. Legal Aid Ontario also notes that in supporting Aboriginal initiatives, it funds the Nishnawbe-Aski Legal Services Corporation certificate and advice lawyer program, which, as already discussed at paragraphs 281, and 282 provides legal services to 49 First Nations in the NAN geographical territory.

## D. RECOMMENDATIONS

### 1. INTRODUCTION

346. Before setting forth specific recommendations, I believe it worthwhile to provide a number of preliminary observations.

347. First, it must be emphasized that recommendations without clear and specific procedures, and details for implementation will be hollow. Because much of the numerous past reports relating to Aboriginal people have gathered dust on the shelf, I am acutely aware that this Report will be greeted cynically by the First Nations community and result in little or no meaningful changes if there are not early and concrete steps taken by the Government to implement my recommendations. For these reasons, I have taken the unusual

<sup>273</sup> *Legal Aid Services Act*, S.O. 1998, c. 26.

step of beginning – rather than ending – my recommendations with the section on Implementation, which includes recommendations for establishing bodies that will be instrumental in turning the words on the page in my Report into action.

348. Second, it is obvious that all the recommendations listed below cannot be implemented at the same time. It is also abundantly clear that resolving the issues on jury representation is going to take time. There is no magic bullet that can provide an instantaneous solution. Consequently, the implementation of various recommendations will need to be prioritized, and milestones and targets scheduled. This is part of the work I anticipate will be carried out by the Implementation Committee and its support staff, which I describe in the section on Implementation of Recommendations that follows.

349. Third, in making recommendations, it is virtually impossible for me to calculate or estimate the financial costs of the recommendations. The Independent Review team has neither the capacity nor expertise to perform those tasks. However, the terms of the mandate as stated in the Order-in-Council call for me to take the financial situation into account in putting forth recommendations.

350. I believe that the best way to comply with the terms of reference, and to make recommendations for the improvement in the representation of on-reserve First Nations peoples on juries, while being respectful of Ontario's financial condition, is the following approach. I have made recommendations that I believe should be made based on what I have heard or observed to improve the jury representation situation. If, on further analysis, these prove to be financially difficult, I would suggest that consideration be given to modify the recommendation in a way that reduces costs while not changing the substance of the recommendation. Alternatively that particular recommendation might be deferred since, as mentioned, every recommendation practically cannot be implemented at the same time. However, these are examples of matters to be left to the Implementation Committee, as discussed below.

351. I realize that many of my recommendations will involve costs, but I would like to say that as much as I can, I have taken financial considerations into account in making the recommendations. With that said, when principles of justice and fairness for thousands of people are involved, the financial aspects of the matter should not trump those fundamental principles in any material way. Moreover, the costs of doing nothing will likely be more than the costs of implementing these recommendations, when one considers the expenses involved by the present approach. This is apart from the greater potential for loss of liberty and increased distress for First Nations peoples and a further deterioration in the relations between the Ministry and First Nations.

352. Fourth, it became apparent almost immediately from the start of the Independent Review that the problems with improving the representation of First Nations peoples on juries are inextricably connected with problems arising from the justice system's treatment of members of First Nations generally. This is an undeniable fact. I realize that my review is not about reforming the justice system of Ontario, but I would be derelict in my duty as the Independent Reviewer to avoid any discussion of the need to address serious issues that arise from how the justice system impacts the question of jury representation. Accordingly, I feel compelled to put forth recommendations which deal with these broader issues. Some of these issues relating to the justice system may be ones for longer term responses, but they are not to be ignored if progress and improvement are to be achieved.

353. Fifth, in listing my recommendations, I do not wish to imply that they are complete in every way, as they may require some fine tuning at the implementation stage, or more substantially, further analysis or study or consultation with First Nations. In addition, I greatly benefitted from the myriad of recommendations from various groups and individuals that have been summarized above. I have done so because the Implementation Committee may well wish to consider some of them as the Committee deems appropriate.

354. Finally, and most importantly, while I believe all of the recommendations below are desirable and would go a long way to enhancing the representation of First Nations peoples on juries, something even more fundamental is required.

355. In my experience dealing with Aboriginal issues as a lawyer (in both public and private practice) and judge, too often I have seen evidence or examples of mistrust and disrespect between Aboriginal and non-Aboriginal Canadians, whether the latter are government or private institutions or individuals. Although the evils of racism and discrimination have diminished over time, much more is needed to foster a relationship of harmony and enlightened co-existence between Aboriginals and non-Aboriginals. Without building a foundation of mutual respect and mutual trust for each other, the recommendations below will achieve nothing. And that respect and trust has to be earned not proclaimed. Concrete proposals and mutual effort are required.



356. To my mind, the model relationship between the two groups should be partners rather than what history reveals as adversaries. First Nations do have governments, and this Independent Review has reinforced my belief in the importance of emphasizing a government-to-government relationship that incorporates an underlying respect for cultural, traditional, and historical values that are different. It is this government-to-government relationship that must underlie the relationship between Ontario and First Nations going forward in dealing with justice and jury representation issues. To recognize this, I have recommended the models of the Implementation Committee and the Advisory Group to the Attorney-General as outlined below.

## 2. IMPLEMENTATION OF RECOMMENDATIONS — ESTABLISHING AN IMPLEMENTATION COMMITTEE AND MINISTER’S ADVISORY GROUP

357. As noted in the introduction above, I have decided to begin my recommendations with this section on implementation. I do so in order to emphasize the fundamental importance of the government moving quickly to create – in partnership with First Nations in Ontario – bodies that can effectively begin the work of responding not just to the problem of underrepresentation of First Nations individuals on juries, but to the broader systemic challenges that have been identified in the course of the Independent Review.

358. As frequently mentioned, cynicism and mistrust of jury participation along with similar concerns about the justice system are widespread within First Nations communities. That cynicism includes doubts among First Nations that much will ever come out of this Independent Review. The Order-in-Council, to some extent, recognizes implicitly this state of affairs. In addition to calling for recommendations to enhance the representation of on-reserve First Nations peoples on juries, it calls for recommendations “to strengthen the understanding, cooperation and relationship between the Ministry of the Attorney General and First Nations on this issue”.

359. To meet the implementation part of my mandate, I have two major recommendations to put forward: the establishment of an Implementation Committee with government and First Nations members and the setting up of an Advisory Group to the Attorney General on matters affecting First Nations and the Justice System.

## (A) IMPLEMENTATION COMMITTEE

**360. RECOMMENDATION 1: I recommend that the Ministry of the Attorney General establish an Implementation Committee consisting of a substantial First Nations membership along with Government officials and individuals who could, because of their background or expertise, contribute significantly to the work of the Implementation Committee. This Committee would be responsible for the oversight of the implementation of the below recommendations and related matters. In view of the importance and urgency of the matter, I recommend that the Committee be established as soon as practically possible.**

361. Having First Nations membership that is substantial and not mere tokenism would underscore the seriousness of the Ministry of the Attorney General to improving the relationship between the Ministry and First Nations and increase the chances of greater acceptance within the First Nations. An example of someone with a unique background or expertise that should be represented on the Committee is an individual who could be a First Nations youth representative. Such a representative would be valuable because of the serious issues facing First Nations youth and the importance of the perspective that a youth representative on the Committee could bring to it, given the dramatic demographic increase of youth referred to in paragraph 228.

362. I do not wish to specify the exact number of people who would serve on the Committee except to say it should be large enough to include individuals who can contribute from their experience and qualifications to the work of the Committee, yet small enough to avoid difficulty in scheduling meetings and conducting its business. It may be that approximately seven to nine members is the appropriate range.

363. The Committee will need to have a support group, which should not be large in number, and could involve secondments from existing Ministry of the Attorney General staff and others as appropriate.

364. The Committee would be appointed by the Attorney General for a three year term with the possibility of a renewal for an additional term. A small secretariat would need to be assembled with the appointment of an Executive Director who could come from the public service.

365. The Committee members would be paid pursuant to provincial practice for boards of directors for independent Crown agencies. The budgets and expenses for the Committee's work would be subject to approval pursuant to Management Board guidelines and established Government of Ontario procedures.

366. The Implementation Committee would be responsible for such things as:

- (a) developing a timetable for implementing the recommendations with milestones to achieve measurable targets as appropriate;
- (b) establishing protocols for meetings, decision making, and related matters;
- (c) issuing annual reports to the Attorney General on progress made in the implementation of recommendations and changes that are deemed important by the Committee to make;
- (d) ensuring there is a proper liaison with the Deputy Attorney General and other officials of the Ministry to achieve a cooperative and collaborative working relationship;
- (e) developing and transmitting recommendations of the Committee for implementation to the Deputy Attorney General for approval; and
- (f) receiving periodic reports from Ministry officials on implementation of recommendations and related matters.



## **(B) ADVISORY GROUP TO THE ATTORNEY GENERAL ON FIRST NATIONS PEOPLES AND THE JUSTICE SYSTEM**

**367. RECOMMENDATION 2: To address paragraph 1(b) of the Order in Council 1288/2011 on August 11, 2011 establishing my mandate, I recommend that the Attorney General establish an Advisory Group to the Attorney General on matters affecting First Nations peoples and the Justice System.** Creating this Group would not only underscore the commitment of the Ministry to improve their relationship with First Nations on jury issues but also on justice system concerns that are related to the participation of First Nations peoples on juries.

368. As I have already mentioned, I believe that relations between the justice system and First Nations have reached the crisis stage. As one senior Ontario government official told us: “justice has not been a friend to First Nations”. This situation has been arrived at over many years of neglect, and a response is required on many fronts, including a top down approach for the Attorney General to seek the candid advice and wisdom of those directly affected, namely First Nations. In my view, this would be welcomed by the First Nations leaders and people with one major proviso: the Advisory Group should not be window dressing but be an effective mechanism for the Attorney General to receive valuable input from First Nations to begin a real pathway to improve elements of the justice system that for too long have been ignored as far as First Nations peoples are concerned.

369. The Group could be asked to meet periodically but at least twice a year as decided by the Attorney General. I would leave other details for the Group, such as membership, to the determination by the Attorney General since it would be presumptuous of me to go any further. In a similar vein, I do not wish to prescribe the agenda items for such a group. We heard much from First Nations people about the importance of restorative justice in the justice system. Accordingly, that could be a point for discussion by the Advisory Group.

370. The recommendations to set up an Implementation Committee and an Advisory Group to the Attorney General will not by that alone solve all the concerns that have been outlined in this Report, but it will signal an important and much needed change in the commitment of Ministry officials to improve the situation facing First Nations. The effective working of the Implementation Committee and Advisory Group will go beyond the signaling stage of a changed commitment, but could well lead to an improved relationship between First Nations and the Ministry of the Attorney General, and even better still to positive and meaningful improvements for First Nations peoples.

### **3. RECOMMENDATIONS RESPECTING SYSTEMATIC CONCERNS ABOUT THE JUSTICE SYSTEM**

371. As I have repeatedly emphasized throughout the Report, it is clear to me that meaningful progress can only be made in improving the representation of First Nations peoples on Ontario’s jury roll if steps are also taken at the same time to respond to the systemic issues that have prevented First Nations peoples from participating in Ontario’s justice system.

372. These systemic issues include:

- conflict between First Nations and Euro-Canadian approaches to criminal justice;
- the systemic racism that unfortunately still appears to be present in our justice system, including instances of mistreatment of First Nations inmates in prison, general disrespect by police and discriminatory public reaction to First Nations complaints;
- the almost universally-held view of First Nations individuals that the justice system is alien or foreign;
- the problem of inadequate legal representation of First Nations individuals, particularly in the north, resulting in virtually automatic guilty pleas;
- but on the positive side, I heard or read some commentary to the effect that if positive changes are made to the justice system then the reticence of First Nations individuals to participate on juries will lessen.

373. In order to address these systemic issues, I recommend that:

- **RECOMMENDATION 3:** after obtaining the input of the Implementation Committee, the Ministry of the Attorney General provide cultural training for all government officials working in the justice system who have contact with First Nations peoples, including police, court workers, Crown prosecutors, prison guards and other related agencies.

I appreciate that a certain level of cultural training is already provided, having been the beneficiary of such training myself as a former judge. However, this training must be consistent, comprehensive and broadly available to all persons working in the justice system who have contact with First Nations peoples, not episodic, ad hoc or limited to certain groups of people.

- **RECOMMENDATION 4:** the Ministry of the Attorney General carry out the following studies for eventual input by the Implementation Committee:

- (a) a study on legal representation that would involve Legal Aid Ontario, particularly in the north, that would cover a variety of topics, including the adequacy of existing legal representation, the location and schedule of court sittings, and related matters. Particular attention should be paid to the practice in the Northwest Territories of holding hearings in remote locations and drawing jury rolls exclusively from residents within 30 kilometres of the court. Similarly, in Alaska the jury pool is drawn from residents within 50 miles of remote courthouses and the defendant has the ability to challenge the representativeness of the jury pool, among other improvements implemented by the state of Alaska outlined in paragraph 193. Northern Ontario's geographical and demographic conditions are very similar to these two jurisdictions;
- (b) a study on First Nations policing issues, including the recognition of First Nations police forces through enabling legislation, the establishment of a regulatory body to oversee the operation of First Nations law enforcement programs, the creation of an independent review board to adjudicate policing complaints, and the development of mandatory cultural competency training for OPP officers; and
- (c) a review of the Aboriginal Court Worker program and an examination of resources required to improve the program.

These studies and reviews need not be long, drawn-out initiatives, and could be carried out by Ministry staff, of course in consultation with First Nations. Ultimately the studies and review should be submitted to the Implementation Committee for review and recommendations.

- **RECOMMENDATION 5:** the Ministry of the Attorney General create an Assistant Deputy Attorney General (ADAG) position responsible for Aboriginal issues, including the implementation of this Report. This official would need a small support group that could draw on the expertise of officials already in the Ministry. The ADAG would have ongoing responsibility for matters affecting First Nations and jury representation, as well as issues with the justice system, as deemed appropriate. This person should be a member of the Implementation Committee, and his/her colleagues would be actively involved in providing input through him/her to the Committee and to the advisory group to the Attorney General as directed. As an example of his/her role, noting the confusion and lack of transparency regarding jury districts in Ontario, the ADAG should be asked to make a map of these districts publicly available.
- **RECOMMENDATION 6:** after obtaining the input of the Implementation Committee, the Ministry of the Attorney General provide broader and more comprehensive justice education programs for First Nations individuals, including:

- (a) **developing brochures in First Nations languages with plain wording which provide comprehensive information on the justice system, including information respecting the role played by criminal, civil, and coroner's juries;**
- (b) **establishing First Nations liaison officers responsible for consulting with First Nations on juries and on justice issues.** The officers would be assigned approximately 15 reserves for their liaison work and would be First Nations people. The officers would also undergo a training program to provide them with the background information necessary to perform their roles; this program would be developed by the Ministry of the Attorney General. The liaison officers could be tasked with holding Jury Information Forums on the reserves within their purview;
- (c) **commissioning the creation of video or other educational instruments, particularly in First Nations languages, that would be used to educate First Nations individuals as to the role played by the jury in the justice system and the importance of participating on the jury; and**
- (d) **considering the feasibility of a program that would enlist students from Ontario law schools to participate in intensive summer education and legal assistance programs for First Nations representatives, dealing with the justice system generally and the jury system in particular, in consultation with Chiefs, and Court Services officials.**

It is important to emphasize that all of the education initiatives above would have to be carried out with the input of the Implementation Committee, but also in consultation with PTOs, other associations, and First Nations.

- **RECOMMENDATION 7: With respect to First Nations youth, in addition to having a youth member on the Implementation Committee, the Implementation Committee should request that the Provincial Advocate for Children and Youth facilitate a conference of representative youth members from First Nations reserves to focus on specific issues in the relationship between youth, juries, and the justice system, addressed in this report.** The Provincial Advocate for Children and Youth should prepare a report on that conference; prior to submitting the report to the Implementation Committee the Provincial Advocate for Children and Youth should consult with PTOs and other First Nations associations.

#### 4. RECOMMENDATIONS RESPECTING THE REFORM OF THE JURY SELECTION PROCESS

374. There is a consensus shared with everyone with whom I met, including government officials, that the current practices followed by Court Services officials to compile the jury list are not achieving results that adequately represent First Nations individuals on the jury roll. It is clear that steps must be taken to obtain access to a database that contains an up-to-date record of the names of individuals living on reserve. The current reliance by Court Services officials on obtaining the names from Band List information, though resulting from well-meaning efforts, is ad hoc and leads in many cases to out-of-date and otherwise unreliable information being used to compile the jury roll. In addition to obtaining an accurate and comprehensive data base, it is clear that much more needs to be done to encourage First Nations individuals to complete and return jury questionnaires when they receive them, and to serve on juries when summonsed to do so.

375. As with my recommendations respecting systemic issues, it is crucial that approaches to deal with these challenges be carried out collaboratively with PTOs and First Nations and coordinated through the Implementation Committee described above, that they take into consideration interests of individual privacy, and that they give due respect to First Nations' autonomy. My hope is that if these issues are pursued on the basis of a relationship of mutual respect and consistently with the government-to-government relationship between First Nations and Ontario, First Nations governments will cooperate to find practical solutions that will overcome these privacy and other logistical issues, so that an appropriate comprehensive and accurate database of First Nations individuals living on reserve can be compiled.

376. In order to address these issues, I recommend that:

- **RECOMMENDATION 8:** the Ministry of the Attorney General, in consultation with the Implementation Committee, undertake a prompt and urgent review of the feasibility of, and mechanisms for, using the OHIP database to generate a database of First Nations individuals living on reserve for the purposes of compiling the jury roll. This appears to me to be the most promising means by which First Nations names can be added to jury rolls. It is my hope that, if it proves feasible, the use of the OHIP database will be implemented on an urgent basis.
- **RECOMMENDATION 9:** in connection with this review, the Ministry of Attorney General and First Nations, in consultation with the Implementation Committee, consider all other potential sources for generating this database, including band residency information, Ministry of Transportation information and other records, and steps that might be taken to secure these records, such as a renewed memorandum of understanding between Ontario and the Federal government respecting band residency information or memorandums of understanding between Ontario and PTOs or First Nations, as appropriate.
- **RECOMMENDATION 10:** the Ministry of the Attorney General, in consultation with the Implementation Committee, consider amending the questionnaire sent to prospective jurors to:
  - (a) make the language as simple as possible;
  - (b) translate the questionnaire into First Nations languages as appropriate;
  - (c) remove the wording threatening a fine for non-compliance and replacing it with wording stating simply that Ontario law requires the recipient to complete and return the form because of the importance of the jury in ensuring fair trials under Ontario's justice system;
  - (d) on the premise that a First Nations member living on reserve in Ontario satisfies the Canadian citizenship requirement under s. 2(b) of the *Juries Act*, add an option for First Nations individual to identify themselves as First Nations members or citizens rather than Canadian citizens;
  - (e) enable First Nations elected officials, such as Chiefs and Councillors, as well as Elders, to be excluded from jury duty; and
  - (f) provide, through an amendment to the *Juries Act*, for a more realistic period than the current five days for the return of jury questionnaires.
- **RECOMMENDATION 11:** the Ministry of the Attorney General, in consultation with the Implementation Committee, consider implementing the practice from parts of the U.S., that when a jury summons or questionnaire is undeliverable or is not returned, another summons or questionnaire is sent out to a resident of the same postal code, thereby ensuring that nonresponsive prospective jurors do not undermine jury representativeness.
- **RECOMMENDATION 12:** the Ministry of the Attorney General, in consultation with the Implementation Committee, consider a procedure whereby First Nations people on reserve could volunteer for jury service as a means of supplementing other jury source lists. This is practised in New York State as a way to supplement jury rolls drawn from several other lists that might overlook certain individuals, and could serve a similarly valuable purpose with respect to First Nations peoples in Ontario. By supplementing other jury source lists in this manner, the Ministry of the Attorney General and the Implementation Committee would wish to be satisfied that this would not offend the randomness principle.

- **RECOMMENDATION 13:** the Ministry of the Attorney General, in consultation with the Implementation Committee, consider enabling First Nations people not fluent in English or French to serve on juries by providing translation services and by amending the jury questionnaire accordingly to reflect this change.
- **RECOMMENDATION 14:** the Ministry of the Attorney General, in consultation with the Implementation Committee, adopt measures to respond to the problem of First Nations individuals with criminal records for minor offences being automatically excluded from jury duty by:
  - (a) amending the *Juries Act* provisions that exclude individuals who have been convicted of certain offences from inclusion on the jury roll, to make them consistent with the relevant *Criminal Code* provisions, which exclude a narrower group of individuals;
  - (b) encouraging and providing advice and support for First Nations individuals to apply for pardons to remove criminal records; and
  - (c) considering whether, after a certain period of time, an individual previously convicted of certain offences could become eligible again for jury service. In New South Wales, people with prior convictions are barred from jury service for two to five years, depending on the offence.
- **RECOMMENDATION 15:** the Ministry of the Attorney General discuss with the Implementation Committee the advisability of recommending to the Attorney General of Canada an amendment to the *Criminal Code* that would prevent the use of peremptory challenges to discriminate against First Nations people serving on juries. A practice that has developed in the U.S. by which judges are able to supervise the exercise of peremptory challenges, if a judge is of the opinion that the challenge is being used in a discriminatory manner. The point of this is that, if every change in the Report is implemented to its fullest, First Nations jury service could still be significantly undermined through discriminatory use of peremptory challenges. It should also be recalled that the Manitoba Inquiry report recommended the abolition of peremptory challenges to avoid the underrepresentation of Aboriginal people on juries.

## 5. RECOMMENDATIONS RESPECTING JURY MEMBER COMPENSATION

377. The current compensation for jury members of \$40 per day from the 11th to 49th day of a trial, and \$100 per day after the 49th day, has been in place since 1991. Considering the Consumer Price Index, if these figures had risen with inflation, they would have stood at \$57.92, and \$144.81 at the end of 2011, respectively.<sup>274</sup>

378. We heard many concerns expressed about the low levels of compensation as well as failure to reimburse for the real costs incurred by a prospective juror for child care or Elder case expenses. We have not had sufficient time or resources to examine this issue with the thoroughness it deserves. However, from all that I have heard on the subject an upward adjustment appears to be warranted, as does a reconsideration of the present provision of no compensation for the first ten days of jury service.

**379. RECOMMENDATION 16:** In view of the concerns I have heard and the fact that current jury compensation is not consistent with cost-of-living increases, I recommend that the Ministry of the Attorney General refer the issue of jury member compensation to the Implementation Committee for consideration and recommendation.

<sup>274</sup> Consumer Price Index, historical summary, online: Statistics Canada  
<<http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/econ46a-eng.htm>>.

## 6. RECOMMENDATIONS RESPECTING CORONER'S INQUESTS

380. The issue of improving First Nations representation on coroner's inquests is worthy of special consideration for at least four reasons.

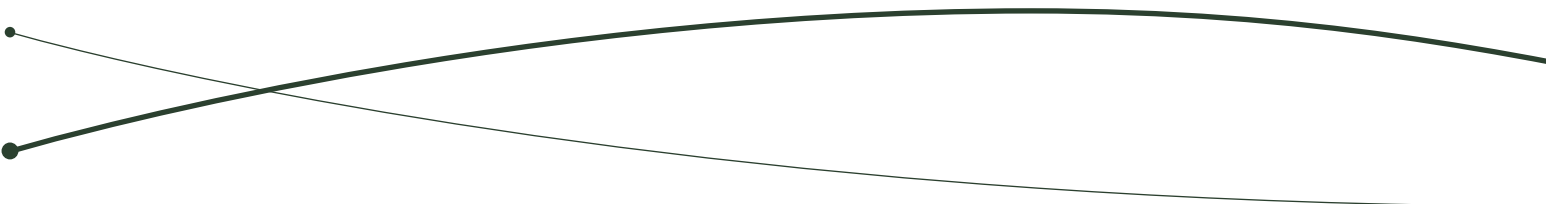
381. First, as described at paragraphs 102 and 103 above, the role played by coroner's juries in answering certain questions and making recommendations, as opposed to making findings of guilt, is remarkably consistent with what has been described to me as the traditional way in which justice has been administered by First Nations communities. My experience in speaking with First Nations individuals was that, while they expressed reluctance to engage in the "judging" involved in being on a criminal jury, they were interested to learn about how the coroner's jury process works and expressed interest in becoming involved.

382. Second, although members of coroner's inquest juries are drawn from the same list as jurors for criminal and civil trials, the process by which the coroner selects a jury is distinct from the criminal and civil jury selection process. As I described at paragraph 102 above, when the coroner begins an inquest, he or she issues a warrant which requires the Provincial Jury Centre to provide a list of jurors living in the area where the death occurred. The Coroner's Constable then selects the names of people whom he or she believes to be "suitable to serve as jurors at an inquest" from that list and issues summonses requiring them to attend at the place of inquest. This process is significantly different from the criminal jury process in particular, which emphasizes the importance of random selection and provides procedural protections for the accused and Crown to challenge jurors and have them removed from the list.

383. Third, it is apparent that the families of First Nations individuals who are the subject of coroner's inquests have a strong and compelling interest in having First Nations individuals, ideally from same community as the individual whose death is being investigated, take part in the coroner's inquest jury. I was very moved to hear these families' stories during the forum organized by Aboriginal Legal Services Toronto. While I do not want to underestimate the importance of First Nations individuals serving on criminal juries, I note that the issue of underrepresentation of First Nations individuals on juries has been particularly prominent in the context of coroner's inquests.

384. Finally, I heard during the engagement process and in the submissions of a number of participants that some First Nations individuals might have an interest in volunteering for jury duty. I understand that this may raise issues of randomness in the context of a criminal or civil trial (though, as I have pointed out, volunteering for jury duty exists in New York State). That is why I have recommended that volunteer service for criminal juries be further considered by the Implementation Committee. But volunteering to be on the jury roll for a coroner's inquest is compatible with the distinct way in which a coroner's jury is empanelled, as well as the unique objectives of a coroner's inquest.

**385. RECOMMENDATION 17: For all of the above reasons, I recommend that the Ministry of the Attorney General, in consultation with the Implementation Committee, institute a process that would allow for First Nations individuals to volunteer to be on the jury roll for the purposes of empanelling a jury for a coroner's inquest.**







# APPENDIX A



# ORDER IN COUNCIL DÉCRET

O.C./DÉCRET 1388/2011

**On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:**

WHEREAS the *Juries Act*, R.S.O. 1990, c. J.3, governs the jury process in Ontario, including the process for preparing the jury roll;

WHEREAS subsection 6 (8) of the *Juries Act* prescribes the process for selecting persons living on reserve communities for potential inclusion on the jury roll;

WHEREAS it has been determined that it is desirable to authorize under the common law, pursuant to the prerogative of Her Majesty the Queen in right of Ontario, and in the discharge of the government's executive functions, an individual to review the process for including persons living on reserve communities on the jury roll and to do so independently of government and on a systemic basis;

WHEREAS Nishnawbe Aski Nation has resolved as a political territorial organization to work with the Ontario government and the Independent Reviewer to enhance the representation on jury rolls of First Nations persons living on reserve communities in its territories;

WHEREAS other First Nations have been, and are, or may be desirous of the same goal;

AND WHEREAS it is desirable to set out the terms of reference for such a review;

THEREFORE, it is ordered that the Honourable Frank Iacobucci be appointed as an Independent Reviewer and authorized to conduct such a review;

**Sur la recommandation de la personne soussignée, le lieutenant-gouverneur, sur l'avis et avec le consentement du Conseil exécutif, décrète ce qui suit :**

ATTENDU QUE la *Loi sur les jurys* (L.R.O. 1990, chap. J.3) régit le processus de sélection des jurés en Ontario, y compris la préparation de la liste des jurés;

ATTENDU QUE le paragraphe 6 (8) de la *Loi sur les jurys* prescrit le processus de sélection des personnes vivant dans des réserves en vue de leur éventuelle inclusion sur la liste des jurés;

ATTENDU QU'il a été déterminé qu'il est souhaitable d'autoriser, en common law et selon la prérogative de Sa Majesté la Reine du chef de l'Ontario, et dans le cadre des fonctions exécutives du gouvernement, un particulier à examiner la procédure d'inclusion des personnes vivant dans des réserves sur la liste des jurés et ce, indépendamment du gouvernement et sur une base systémique;

ATTENDU QUE Nishnawbe Aski Nation a résolu, en tant qu'organisation territoriale politique, de travailler avec le gouvernement de l'Ontario et l'examineur indépendant pour accroître la représentation, sur les listes de jurés, des membres des Premières nations vivant dans des réserves situées sur ses territoires;

ATTENDU QUE d'autres Premières nations ont aspiré, aspirent ou peuvent aspirer au même but;

ET ATTENDU QU'il est souhaitable d'énoncer le cadre de référence d'un examen de ce genre;

EN CONSÉQUENCE, il est ordonné que l'honorable Frank Iacobucci soit nommé à titre d'examineur indépendant et autorisé à procéder à cet examen;

AND THAT the terms of reference for the Honourable Frank Iacobucci be as follows:

## MANDATE

1. The Independent Reviewer shall conduct a systemic review and report on any relevant legislation and processes for including First Nations persons living on reserve on the jury roll from which potential jurors are selected for all jury trials and coroners inquests, in order to make recommendations:
  - a. to ensure and enhance the representation of First Nations persons living on reserve communities on the jury roll; and
  - b. to strengthen the understanding, cooperation and relationship between the Ministry of the Attorney General and First Nations on this issue.
2. The Independent Reviewer shall conduct the review in an expeditious manner and shall deliver his final report and recommendations to the Attorney General no later than August 31, 2012.
3. While promoting the achievement of the goals described above, any recommendations developed should take into account the challenging fiscal context for government and First Nations in Ontario.
4. In conducting the review, the Independent Reviewer shall:
  - a. review the existing legislation and processes, practices and past practices;
  - b. review and consider any existing records or reports relevant to this mandate, including jury rolls in a systemic context, and any transcripts relating to public legal proceedings;
  - c. conduct interjurisdictional analysis, including any relevant legislation, and identify best practices.

ET QUE le mandat de l'honorable Frank Iacobucci soit le suivant :

## MANDAT

1. L'examineur indépendant procède à un examen systémique et prépare un rapport sur les dispositions législatives et la procédure pertinentes en vue d'inclure des membres des Premières nations vivant dans des réserves sur la liste des jurés à partir de laquelle sont choisis les jurés potentiels pour tous les procès devant jury et toutes les enquêtes du coroner, dans le but de faire des recommandations visant ce qui suit :
  - a. garantir et accroître la représentation, sur la liste des jurés, des membres des Premières nations vivant dans des réserves;
  - b. consolider la compréhension, la collaboration et les relations entre le ministère du Procureur général et les Premières nations en ce qui concerne cette question.
2. L'examineur indépendant procède promptement à l'examen et remet son rapport final et ses recommandations au procureur général au plus tard le 31 août 2012.
3. Bien qu'elles visent à favoriser la réalisation des buts énoncés ci-dessus, les recommandations formulées devraient tenir compte de la conjoncture fiscale difficile à laquelle font face le gouvernement et les Premières nations de l'Ontario.
4. Dans le cadre de son examen, l'examineur indépendant :
  - a. examine les dispositions législatives et la procédure en vigueur ainsi que les pratiques actuelles et passées;
  - b. examine et étudie les dossiers ou les rapports existants qui se rapportent à son mandat, y compris les listes de jurés dans un contexte systémique, et les transcriptions relatives aux procédures judiciaires publiques;
  - c. procède à une analyse interterritoriale, notamment des dispositions législatives pertinentes, et détermine les meilleures pratiques à suivre.



5. In conducting the review, the Independent Reviewer may request any person to provide information or records to him, hold public and/or private meetings and hold consultations with First Nations communities, including attendances on First Nations communities.

6. The Independent Reviewer shall invite and receive submissions in writing from any First Nation, First Nation political territorial organization, First Nation organization, member of a First Nation as well as from any interested party, including ministries of government.

7. In fulfilling his mandate, the Independent Reviewer shall not report on any individual cases that are, have been, or may be subject to a criminal investigation or

8. The Independent Reviewer shall perform his duties without making any findings of fact in relation to misconduct, or expressing any conclusions or recommendations regarding the civil or criminal liability of any person or organization, and without interfering in any investigations or criminal or other legal proceedings.

9. In delivering his report to the Attorney General, the Independent Reviewer shall ensure that the report is in a form appropriate, pursuant to the *Freedom of Information and Protection of Privacy Act* and other applicable legislation, and in sufficient quantity, for public release and be responsible for translation and printing, and shall ensure that it is available in English, French, Cree, Ojibway, Oji-Cree and Mohawk at the same time, in electronic and printed versions. The Attorney General shall make the report available to the public.

## RESOURCES

10. Within a budget approved by the Ministry of the Attorney General the Independent Reviewer may retain such counsel, staff, or expertise he considers necessary in the performance of his duties at reasonable remuneration approved by the Ministry of the Attorney General. They shall be reimbursed for reasonable expenses

5. Dans le cadre de son examen, l'examineur indépendant peut demander à toute personne de lui fournir des renseignements ou des documents, tenir des séances publiques ou à huis clos et engager des consultations avec des collectivités des Premières nations, y compris se rendre sur place.

6. L'examineur indépendant demande et reçoit des observations écrites des Premières nations, de toute organisation territoriale politique des Premières nations, de toute organisation des Premières nations, de tout membre d'une Première Nation ainsi que de toute partie intéressée, y compris des ministères du gouvernement.

7. Dans le cadre de son mandat, l'examineur indépendant ne doit pas faire rapport sur des causes particulières qui font, ont fait ou peuvent faire l'objet d'une enquête, notamment pénale, d'une poursuite pénale ou d'une autre procédure judiciaire.

8. L'examineur indépendant s'acquitte de ses fonctions sans tirer de conclusions de fait en matière d'inconduite ni formuler de conclusions ou de recommandations quant à la responsabilité civile ou pénale de toute personne ou de tout organisme et sans intervenir dans des enquêtes ou des procédures judiciaires, notamment des poursuites pénales.

9. L'examineur indépendant veille à remettre son rapport au procureur général sous une forme appropriée, conformément à la *Loi sur l'accès à l'information et la protection de la vie privée* et aux autres lois applicables, et en nombre d'exemplaires suffisant pour sa diffusion publique et doit en assurer la traduction et l'impression. En outre, il fait en sorte qu'il soit disponible en même temps en version française, anglaise, cri, ojibway, ojicri et mohawk et tant sur support électronique que papier. Le procureur général met le rapport à la disposition du public.

## RESSOURCES

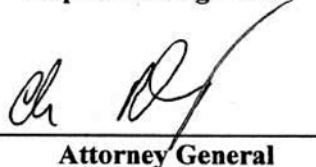
10. Dans le cadre d'un budget approuvé par le ministère du Procureur général, l'examineur indépendant peut retenir les services des avocats, du personnel ou des experts qu'il juge nécessaires à l'exercice de ses fonctions selon la rémunération raisonnable approuvée par le ministère du Procureur général. Les

incurred in connection with their duties in accordance with Management Board of Cabinet Directives and Guidelines.

11. The Independent Reviewer shall establish and maintain a website and use other technologies to promote accessibility and transparency to the public.
12. The Independent Reviewer shall follow Management Board of Cabinet Directives and Guidelines and other applicable government policies in obtaining other services and goods he considers necessary in the performance of his duties unless, in his view, it is not possible to follow them.
13. The Independent Reviewer may make recommendations to the Attorney General or the Deputy Attorney General regarding funding for parties who have information relevant to the systemic issues and who would be unable to participate in the review without such funding. Any such funding recommendations shall be in accordance with Management Board of Cabinet Directives and Guidelines.
14. All ministries and all agencies, boards and commissions of the Government of Ontario shall, subject to any privilege or other legal restrictions, assist the Independent Reviewer to the fullest extent so that the Independent Reviewer may carry out his duties and shall respect the independence of the review.

**Recommandé par : Le procureur général,**

**Recommended**

  
**Attorney General**

**Approuvé et décrété le**

**Approved and Ordered**

**AUG 11 2011**

**Date**

personnes retenues se font rembourser les frais raisonnables engagés dans l'exercice de leurs fonctions, conformément aux directives et aux lignes directrices du Conseil de gestion du gouvernement.

11. L'examineur indépendant se dote d'un site Web et utilise d'autres technologies pour promouvoir l'accessibilité et la transparence.
12. À moins que, à son avis, cela ne soit pas possible, l'examineur indépendant suit les directives et les lignes directrices du Conseil de gestion du gouvernement ainsi que les autres politiques applicables du gouvernement dans le cadre de l'obtention des autres biens et services qu'il estime nécessaires à l'exercice de ses fonctions.
13. L'examineur indépendant peut faire des recommandations au procureur général ou au sous-procureur général en ce qui concerne le financement des parties qui détiennent des renseignements se rapportant aux questions systémiques et qui, à défaut de ce financement, ne seraient pas en mesure de participer à l'examen. Ces recommandations doivent être conformes aux directives et aux lignes directrices du Conseil de gestion du gouvernement.
14. Sous réserve de tout privilège ou de toute autre restriction légale, tous les ministères ainsi que tous les organismes, conseils et commissions du gouvernement de l'Ontario prêtent sans réserve leur concours à l'examineur indépendant de façon qu'il puisse s'acquitter de ses fonctions et ils respectent l'indépendance de l'examen.

**Appuyé par : Le président du Conseil des ministres,**

**Concurred**

  
**Chair of Cabinet**

**L'administratrice du gouvernement**

  
**Administrator of the Government**





# APPENDIX B



# ***JURIES ACT***

**R.S.O. 1990, CHAPTER J.3**

**CONSOLIDATION PERIOD: FROM JUNE 30, 2010 TO THE E-LAWS CURRENCY DATE.**

**LAST AMENDMENT: 2009, C. 33, SCHED. 2, S. 38.**

## **DEFINITIONS**

1. In this Act,

“county” includes a district; (“comté”)

“Director of Assessment” means the employee of the Municipal Property Assessment Corporation who is appointed by the Corporation to be the Director of Assessment under this Act; (“directeur de l’évaluation”)

“regulations” means the regulations made under this Act. (“règlements”) R.S.O. 1990, c. J.3, s. 1; 1997, c. 43, Sched. G, s. 22; 2001, c. 8, s. 206.

## **ELIGIBILITY**

### **ELIGIBLE JURORS**

2. Subject to sections 3 and 4, every person who,

(a) resides in Ontario;

(b) is a Canadian citizen; and

(c) in the year preceding the year for which the jury is selected had attained the age of eighteen years or more,

is eligible and liable to serve as a juror on juries in the Superior Court of Justice in the county in which he or she resides. R.S.O. 1990, c. J.3, s. 2; 2006, c. 19, Sched. C, s. 1 (1).

### **INELIGIBILITY TO SERVE AS JUROR**

#### **INELIGIBLE OCCUPATIONS**

3. (1) The following persons are ineligible to serve as jurors:

1. Every member of the Privy Council of Canada or the Executive Council of Ontario.

2. Every member of the Senate, the House of Commons of Canada or the Assembly.

3. Every judge and every justice of the peace.

4. Every barrister and solicitor and every student-at-law.

5. Every legally qualified medical practitioner and veterinary surgeon who is actively engaged in practice and every coroner.

6. Every person engaged in the enforcement of law including, without restricting the generality of the

foregoing, sheriffs, wardens of any penitentiary, superintendents, jailers or keepers of prisons, correctional institutions or lockups, sheriff's officers, police officers, firefighters who are regularly employed by a fire department for the purposes of subsection 41 (1) of the *Fire Protection and Prevention* Act, 1997, and officers of a court of justice. R.S.O. 1990, c. J.3, s. 3 (1); 1994, c. 27, s. 48 (1); 1997, c. 4, s. 82.

(2) Repealed: 1994, c. 27, s. 48 (2).

### **CONNECTION WITH COURT ACTION AT SAME SITTINGS**

(3) Every person who has been summoned as a witness or is likely to be called as a witness in a civil or criminal proceeding or has an interest in an action is ineligible to serve as a juror at any sittings at which the proceeding or action might be tried. R.S.O. 1990, c. J.3, s. 3 (3).

### **PREVIOUS SERVICE**

(4) Every person who, at any time within three years preceding the year for which the jury roll is prepared, has attended court for jury service in response to a summons after selection from the roll prepared under this Act or any predecessor thereof is ineligible to serve as a juror in that year. R.S.O. 1990, c. J.3, s. 3 (4); 1994, c. 27, s. 48 (3).

### **INELIGIBILITY FOR PERSONAL REASONS**

4. A person is ineligible to serve as a juror who,

- (a) has a physical or mental disability that would seriously impair his or her ability to discharge the duties of a juror; or
- (b) has been convicted of an offence that may be prosecuted by indictment, unless the person has subsequently been granted a pardon. R.S.O. 1990, c. J.3, s. 4; 2009, c. 33, Sched. 2, s. 38 (1).

## **PREPARATION OF JURY ROLLS**

### **DUTY OF SHERIFF**

#### **NUMBER OF JURORS ON ROLL**

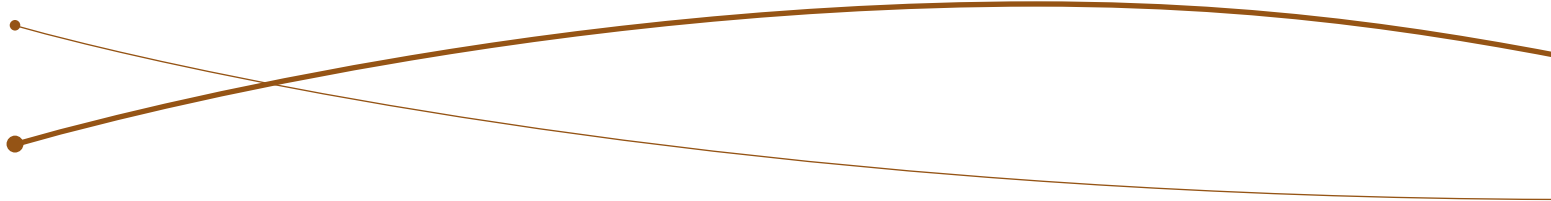
5. (1) The sheriff for a county shall on or before the 15th day of September in each year determine for the ensuing year for the county,

- (a) the number of jurors that will be required for each sittings of the Superior Court of Justice;
- (b) the number of persons that will be required for selection from the jury roll for the purposes of any other Act; and
- (c) the aggregate number of persons that will be so required. R.S.O. 1990, c. J.3, s. 5 (1); 2006, c. 19, Sched. C, s. 1 (1).

#### **NUMBER OF JURORS IN DISTRICTS**

(2) In a territorial district, after determining the number of persons that will be required for service during the ensuing year, the sheriff shall fix the total number of persons that shall be selected from municipalities, and the total number that shall be selected from territory without municipal organization. R.S.O. 1990, c. J.3, s. 5 (2).

### **TRANSMISSION OF RESOLUTIONS**



- (3) The sheriff shall forthwith upon making the determination under subsection (1) certify and transmit,
- (a) to the Director of Assessment,
    - (i) a copy of the determination declaring the aggregate number of persons required for the jury roll in the county in the ensuing year, and
    - (ii) a statement of the numbers of jury service notices to be mailed to persons in the county; and
  - (b) to the local registrar of the Superior Court of Justice, a copy of the determination for the number of jurors under clause (1) (a). R.S.O. 1990, c. J.3, s. 5 (3); 2006, c. 19, Sched. C, s. 1 (1).

### **JURY SERVICE NOTICES**

6. (1) The Director of Assessment shall in each year on or before the 31st day of October cause a jury service notice, together with a return to the jury service notice in the form prescribed by the regulations and a prepaid return envelope addressed to the sheriff for the county, to be mailed by first class mail to the number of persons in each county specified in the sheriff's statement, and selected in the manner provided for in this section. R.S.O. 1990, c. J.3, s. 6 (1).

### **SELECTION OF PERSONS NOTIFIED**

(2) The persons to whom jury service notices are mailed under this section shall be selected by the Director of Assessment at random from persons who, from information obtained at the most recent enumeration of the inhabitants of the county under section 15 of the *Assessment Act*,

- (a) at the time of the enumeration, resided in the county and were Canadian citizens; and
- (b) in the year preceding the year for which the jury is selected, are of or will attain the age of eighteen years or more,

and the number of persons selected from each municipality in the county shall bear approximately the same proportion to the total number selected for the county as the total number of persons eligible for selection in the municipality bears to the total number eligible for selection in the county, as determined by the enumeration. R.S.O. 1990, c. J.3, s. 6 (2).

### **APPLICATION OF SUBS. (2) TO MUNICIPALITIES IN DISTRICTS**

(3) In a territorial district for the purposes of subsection (2), all the municipalities in the district shall together be treated in the same manner as a county from which the number of jurors required is the number fixed under subsection 5(2) to be selected from municipalities. R.S.O. 1990, c. J.3, s. 6 (3).

### **ADDRESS FOR MAILING**

(4) The jury service notice to a person under this section shall be mailed to the person at the address shown in the most recent enumeration of the inhabitants of the county under section 15 of the *Assessment Act*. R.S.O. 1990, c. J.3, s. 6 (4).

### **RETURN TO JURY SERVICE NOTICE**

(5) Every person to whom a jury service notice is mailed in accordance with this section shall accurately and truthfully complete the return and shall mail it to the sheriff for the county within five days after receipt thereof. R.S.O. 1990, c. J.3, s. 6 (5).

## **WHEN SERVICE DEEMED MADE**

(6) For the purposes of subsection (5), the notice shall be deemed to have been received on the third day after the day of mailing unless the person to whom the notice is mailed establishes that he or she, acting in good faith, through absence, accident, illness or other cause beyond his or her control did not receive the notice or order, or did not receive the notice or order until a later date. R.S.O. 1990, c. J.3, s. 6 (6).

## **LIST OF NOTICES GIVEN**

(7) The Director of Assessment shall furnish to the sheriff for the county a list of persons in the county arranged alphabetically to whom jury service notices were mailed under this section forthwith after such mailing and the list received by the sheriff purporting to be certified by the Director of Assessment is, without proof of the office or signature of the Director of Assessment, receivable in evidence in any proceeding as proof, in the absence of evidence to the contrary, of the mailing of jury service notices to the persons shown on the list. R.S.O. 1990, c. J.3, s. 6 (7).

## **INDIAN RESERVES**

(8) In the selecting of persons for entry in the jury roll in a county or district in which an Indian reserve is situate, the sheriff shall select names of eligible persons inhabiting the reserve in the same manner as if the reserve were a municipality and, for the purpose, the sheriff may obtain the names of inhabitants of the reserve from any record available. R.S.O. 1990, c. J.3, s. 6 (8).

## **SHERIFF TO PREPARE JURY ROLL**

7. The sheriff shall in each year prepare a roll called the jury roll in the form prescribed by the regulations. R.S.O. 1990, c. J.3, s. 7.

## **ENTRY OF NAMES IN JURY ROLL**

8. (1) The sheriff shall open the returns to jury service notices received by the sheriff and shall cause the name, address and occupation of each person making such a return, who is shown by the return to be eligible for jury service, to be entered in the jury roll alphabetically arranged and numbered consecutively. R.S.O. 1990, c. J.3, s. 8 (1); 1994, c. 27, s. 48 (4).

## **ENGLISH, FRENCH AND BILINGUAL JURORS**

(2) The jury roll prepared under subsection (1) shall be divided into three parts, as follows:

1. A part listing the persons who appear, by the returns to jury service notices, to speak, read and understand English.
2. A part listing the persons who appear, by the returns to jury service notices, to speak, read and understand French.
3. A part listing the persons who appear, by the returns to jury service notices, to speak, read and understand both English and French. 1994, c. 27, s. 48 (5).

## **OMISSION OF NAMES**

(3) The sheriff may, with the written approval of a judge of the Superior Court of Justice, omit the name from the roll where it appears such person will be unable to attend for jury duty. R.S.O. 1990, c. J.3, s. 8 (3); 2006, c. 19, Sched. C, s. 1 (1).



## **SUPPLEMENTARY NAMES**

(4) The sheriff may request the Director of Assessment to mail such number of additional jury service notices and forms of returns to jury service notice as in the opinion of the sheriff are required. R.S.O. 1990, c. J.3, s. 8 (4).

## **SUPPLYING OF SUPPLEMENTARY NAMES**

(5) Upon receipt of a request from the sheriff under subsection (4), the Director of Assessment shall forthwith carry out such request and for such purpose section 6 applies with necessary modifications with respect to the additional jury service notices requested by the sheriff to be mailed. R.S.O. 1990, c. J.3, s. 8 (5).

## **SELECTION FROM UNORGANIZED TERRITORY**

(6) In a territorial district, the sheriff shall select names of eligible persons who reside in the district outside territory with municipal organization in the numbers fixed under subsection 5(2) and for the purpose may have recourse to the latest polling list prepared and certified for such territory, and to any assessment or collector's roll prepared for school purposes and may obtain names from any other record available. R.S.O. 1990, c. J.3, s. 8 (6).

## **CERTIFICATION OF ROLL**

9. As soon as the jury roll has been completed but not later than the 31st day of December in each year, the sheriff shall certify the roll to be the proper roll prepared as the law directs and shall deliver notice of the certification to a judge of the Superior Court of Justice, but a judge of the court may extend the time for certification for such reasons as he or she considers sufficient. R.S.O. 1990, c. J.3, s. 9; 2006, c. 19, Sched. C, s. 1 (1).

## **EXTENSION OF TIMES**

10. The Chief Justice of the Superior Court of Justice may, upon the request of the sheriff for a county, extend any times prescribed by this Act in connection with the preparation of the jury roll for the county to such date as the Chief Justice considers appropriate and may authorize the continued use of the latest jury roll until the dates so fixed. R.S.O. 1990, c. J.3, s. 10; 2006, c. 19, Sched. C, s. 2 (1).

## **ADDITIONS TO ROLL BY SHERIFF**

11. (1) Where there are no persons or not a sufficient number of persons on the proper jury roll, or where there is no jury roll for the year in existence, the sheriff may supply names of eligible jurors from the jury rolls for the three nearest preceding years for which there is a jury roll or certified copy thereof in existence. R.S.O. 1990, c. J.3, s. 11 (1).

## **CERTIFICATION OF ADDITIONS BY SHERIFF**

(2) The names supplied to the jury roll under this section shall be entered thereon and certified by the sheriff. R.S.O. 1990, c. J.3, s. 11 (2).

## **JURY PANELS**

### **ISSUANCE OF PRECEPTS**

12. A judge of the Superior Court of Justice may issue precepts in the form prescribed by the regulations to the sheriff for the return of such number of jurors as the sheriff has determined as the number to be drafted and returned or such greater or lesser number as in his or her opinion is required. R.S.O. 1990, c. J.3, s. 12; 2006, c. 19, Sched. C, s. 1 (1).

## **TWO OR MORE SETS OF JURORS**

**13.** (1) Where a judge of the Superior Court of Justice considers it necessary that the jurors to form the panel for a sittings of the Superior Court of Justice be summoned in more than one set, the judge may direct the sheriff to return such number of jurors in such number of sets on such day for each set as he or she thinks fit. R.S.O. 1990, c. J.3, s. 13 (1); 2006, c. 19, Sched. C, s. 1 (1).

## **SHERIFF TO DIVIDE JURORS INTO SETS**

(2) The sheriff shall divide such jurors into as many sets as are directed, and shall in the summons to every juror specify at what time his or her attendance will be required. R.S.O. 1990, c. J.3, s. 13 (2).

## **EACH SET A SEPARATE PANEL**

(3) Each set shall for all purposes be deemed a separate panel. R.S.O. 1990, c. J.3, s. 13 (3).

## **ADDITIONAL JURORS**

**14.** (1) A judge of the Superior Court of Justice, after the issue of the precept, at any time before or during the sittings of the court, by order under his or her hand and seal, may direct the sheriff to return an additional number of jurors. R.S.O. 1990, c. J.3, s. 14 (1); 2006, c. 19, Sched. C, s. 1 (1).

## **DUTY OF SHERIFF AS TO DRAFTING ADDITIONAL NUMBER OF JURORS**

(2) The sheriff, upon the receipt of an order under subsection (1), shall forthwith draft such additional number of jurors in the manner provided by this Act, and shall add their names to the panel list, and shall forthwith thereafter summon them, and where there are not a sufficient number of jurors on the jury roll for the purpose of the additions, section 11 applies. R.S.O. 1990, c. J.3, s. 14 (2).

## **HOW SHERIFFS TO DRAFT PANELS OF JURORS**

**15.** Every sheriff to whom a precept for the return of jurors is directed shall, to such precept, return a panel list of the names of the jurors contained in the jury roll, whose names shall be drafted from such roll in the manner hereinafter mentioned. R.S.O. 1990, c. J.3, s. 15.

## **SHERIFF TO DRAFT PANEL**

**16.** Upon receipt of the precept, the sheriff shall post up in his or her office written notice of the day, hour and place at which the panel of jurors will be drafted, and the sheriff shall draft the panel by ballot from the jury roll in the presence of a justice of the peace who shall attend upon reasonable notice from the sheriff. R.S.O. 1990, c. J.3, s. 16.

## **HOW SHERIFF TO PREPARE A PANEL**

**17.** (1) Before proceeding to draft a panel of jurors from a jury roll, the sheriff shall prepare a proper title or heading for the list of jurors to be returned, to which he or she shall fix an appropriate number according as such panel is the first, second, third or subsequent panel drafted from such jury roll, and the title or heading shall set forth the number of jurors to be returned. R.S.O. 1990, c. J.3, s. 17 (1).

## **BALLOTS FOR DRAFTING PANEL**

(2) The sheriff shall then append to such title or heading a list of numbers from "1" forward to the number required, and shall prepare a set of ballots of uniform and convenient size containing the same number of ballots as there are numbers on the jury roll, allowing one number to each ballot, which number shall be printed or written on it, and the sheriff shall then proceed to draft the panel of jurors. R.S.O. 1990, c. J.3, s. 17 (2).



## **DRAFTING OF PANEL**

**18.** (1) The sheriff shall draft the panel by drawing at random the ballots from a container in the presence of the justice of the peace. R.S.O. 1990, c. J.3, s. 18 (1).

## **PANEL LIST**

(2) The names of the persons so drafted, arranged alphabetically, with their places of residence and occupations shall then be transcribed by the sheriff, with a reference to the number of each name on the jury roll, and each name shall be thereupon marked by the sheriff or the sheriff's deputy upon the jury roll. R.S.O. 1990, c. J.3, s. 18 (2).

(3) Repealed: 1994, c. 27, s. 48 (6).

## **IDEM**

(4) The panel list so alphabetically arranged and numbered, with a short statement of the precept in obedience to which it has been drafted, the date and place of such drafting, and the names of the sheriff, or the sheriff's deputy and the justice of the peace, present at such drafting, shall then be recorded and attested by the signatures of the sheriff, or the sheriff's deputy and the justice of the peace, and such panel list shall be retained in the custody of the sheriff. R.S.O. 1990, c. J.3, s. 18 (4).

## **AUTOMATED PROCEDURE FOR DRAFTING PANEL**

**18.1** (1) Instead of following the procedure described in sections 15 to 18 to draft a panel of jurors, the sheriff may use any electronic or other automated procedure to accomplish the same result. 1994, c. 27, s. 48 (7).

## **NON-APPLICATION OF CERTAIN REQUIREMENTS**

(2) When a jury panel is being drafted under subsection (1),

(a) notice need not be posted as set out in section 16;

(b) the participation of a justice of the peace, as referred to in section 16 and subsections 18 (1) and (4), is not required. 1994, c. 27, s. 48 (7).

## **CRIMINAL RECORD CHECK**

**18.2** (1) For the purposes of confirming whether clause 4 (b) applies in respect of a person selected under section 18 or 18.1 for inclusion on a jury panel, the sheriff may, in accordance with this section and the regulations, request that a criminal record check, prepared from national data on the Canadian Police Information Centre database, be conducted concerning the person. 2009, c. 33, Sched. 2, s. 38 (2).

## **TIMING**

(2) A criminal record check concerning a person that is requested under subsection (1) shall be obtained by the sheriff before he or she finalizes the jury panel on which the person is to be included. 2009, c. 33, Sched. 2, s. 38 (2).

## **COLLECTION, USE AND DISCLOSURE OF PERSONAL INFORMATION BY SHERIFF**

(3) Subject to any restrictions or conditions set out in the regulations, the sheriff shall collect, directly or indirectly, use and disclose such personal information respecting a person who is the subject of a criminal record check under subsection (1) as is required for the purposes of this section. 2009, c. 33, Sched. 2, s. 38 (2).

## **AGREEMENT WITH POLICE FORCE**

(4) The sheriff may enter into an agreement with a police force that is prescribed by the regulations respecting,

- (a) the preparation of a criminal record check by the police force for the purposes of this section; and
- (b) the collection, use and disclosure of personal information by the police force for the purposes of the criminal record check. 2009, c. 33, Sched. 2, s. 38 (2).

## **REMOVAL AND REPLACEMENT**

(5) If, on review of a person's criminal record check, the sheriff determines that clause 4 (b) applies in respect of the person, the sheriff shall,

- (a) remove the person from the jury panel on which the person was to have been included;
- (b) remove the person's name and other information from the jury roll for the applicable year; and
- (c) draft, in accordance with section 18 or 18.1, as the case may be, another person for the jury panel to replace the person who was removed. 2009, c. 33, Sched. 2, s. 38 (2).

## **NOTICE**

### **SUMMONING JURORS 21 DAYS BEFORE ATTENDANCE REQUIRED**

**19.** (1) The sheriff shall summon every person drafted to serve on juries by sending to the person by ordinary mail a notice in writing in the form prescribed by the regulations under the hand of the sheriff at least twenty-one days before the day upon which the person is to attend, but when the sheriff is directed to draft and summon additional jurors under this Act, such twenty-one days service is not necessary. R.S.O. 1990, c. J.3, s. 19 (1).

### **EXCUSING OF JURORS**

(2) The sheriff may excuse any person summoned for a jury sittings on the ground,

- (a) of illness; or
- (b) that serving as a juror may cause serious hardships or loss to the person or others,

but unless a judge of the Superior Court of Justice directs otherwise and despite any other provision of this Act, such person shall be included in a panel to be returned for a sittings later in the year or, where there are not further sittings in that year, in a panel to be returned for a sittings in the year next following. R.S.O. 1990, c. J.3, s. 19 (2); 2006, c. 19, Sched. C, s. 1 (1).

### **SECRECY OF JURY ROLL AND PANEL**

**20.** The jury roll and every list containing the names of the jury drafted for any panel shall be kept under lock and key by the sheriff, and except in so far as may be necessary in order to prepare the panel lists, and serve the jury summons, shall not be disclosed by the sheriff, the sheriff's deputy, officer, clerk, or by the justice of the peace mentioned in section 16, or by any other person, until ten days before the sittings of the court for which the panel has been drafted, and during such period of ten days, the sheriff, or the sheriff's deputy, shall permit the inspection at all reasonable hours of the jury roll and of the panel list or copy thereof in his or her custody by litigants or accused persons or their solicitors and shall furnish the litigants or accused persons or their solicitors, upon request and payment of a fee of \$2, with a copy of any such panel list. R.S.O. 1990, c. J.3, s. 20.

## **ATTENDANCE OF JURORS POSTPONED OR NOT REQUIRED COUNTERMAND WHERE NO JURY CASES**

**21.** (1) Where there is no business requiring the attendance of a jury at a sittings in respect of which a precept has been issued,

(a) the local registrar, where the sittings is for the trial of actions; or

(b) the Crown Attorney, where the sittings is for the trial of criminal prosecutions,

shall, at least five clear days before the day upon which the sittings is to commence, give notice in writing to the sheriff in the form prescribed by the regulations that the attendance of the jurors is not required. R.S.O. 1990, c. J.3, s. 21 (1).

## **POSTPONEMENT OF DATE FOR ATTENDANCE OF JURORS**

(2) Where the business of the court does not require the attendance of the jurors until a day after the day upon which the sittings is to commence, the appropriate officer determined under subsection (1) shall, at least five clear days before the day upon which the sittings is to commence, give notice in writing to the sheriff in the form prescribed by the regulations that the attendance of the jurors is not required until such later day as is specified in the notice. R.S.O. 1990, c. J.3, s. 21 (2).

## **NOTICE TO JURORS**

(3) Subject to subsection (4), where, upon receipt of such notice it appears to the sheriff that the attendance of jurors is not required or not required until a later date, the sheriff shall forthwith by registered mail or otherwise, as he or she considers expedient, notify in the form prescribed by the regulations each person summoned to serve as a juror that attendance at the sittings is not required or is not required until the day specified in the notice. R.S.O. 1990, c. J.3, s. 21 (3).

## **SHERIFF MUST ASCERTAIN THAT THERE ARE NO PRISONERS IN CUSTODY**

(4) In the case of a sittings for the hearing of criminal proceedings, the sheriff shall not give the notice mentioned in subsection (3) unless he or she is satisfied that there is no prisoner in custody awaiting trial at the sittings. R.S.O. 1990, c. J.3, s. 21 (4).

## **DIVISION OF PANEL**

**22.** A judge of the Superior Court of Justice who considers it necessary may direct that the jurors summoned for a sittings of the Court be divided into two or more sets as he or she may direct, and each set shall for all purposes be deemed a separate panel. R.S.O. 1990, c. J.3, s. 22; 2006, c. 19, Sched. C, s. 1 (1).

## **MERGER**

**22.1** A judge of the Superior Court of Justice who considers it necessary may direct that two or more panels of jurors, including panels established by division under section 22, be merged into a single panel. 1994, c. 27, s. 48 (8); 2006, c. 19, Sched. C, s. 2 (2).

## **EXCUSING OF JUROR RELIGIOUS REASONS**

**23.** (1) A person summoned for jury duty may be excused by a judge from service as a juror on the ground that service as a juror is incompatible with the beliefs or practices of a religion or religious order to which the person belongs. R.S.O. 1990, c. J.3, s. 23 (1).

### **ILLNESS OR HARDSHIP**

(2) A person summoned for jury duty may be excused by a judge from attending the sittings on the ground,

(a) of illness; or

(b) that serving as a juror may cause serious hardships or loss to the person or others,

and the judge may excuse the person from all service as a juror, or the judge may direct that the service of a person excused be postponed and that despite any provision of this Act, the person be included in a panel to be returned for a sittings later in that year or in a panel to be returned for a sittings in the year next following. R.S.O. 1990, c. J.3, s. 23 (2).

### **APPLICATION FOR EXCUSING**

(3) A person summoned for jury service may be excused under subsection (1) or (2),

(a) before the day for attendance, by any judge of the Superior Court of Justice;

(b) on or after the day for attendance, by the judge presiding at the sittings,

and the application to be excused may be made to the sheriff. R.S.O. 1990, c. J.3, s. 23 (3); 2006, c. 19, Sched. C, s. 1 (1).

### **RELEASE AND TRANSFER OF JURORS**

#### **RELEASE BEFORE SITTINGS**

**24.** (1) Where jurors are summoned for a jury sittings, a judge of the Superior Court of Justice may, at any time before the sittings, release from or postpone service of any number of jurors summoned for the sittings. R.S.O. 1990, c. J.3, s. 24 (1); 2006, c. 19, Sched. C, s. 1 (1).

#### **RELEASE DURING SITTINGS**

(2) The judge presiding at the sittings may release from or postpone service of any number of jurors summoned for the sittings. R.S.O. 1990, c. J.3, s. 24 (2).

#### **TRANSFER TO ANOTHER PANEL**

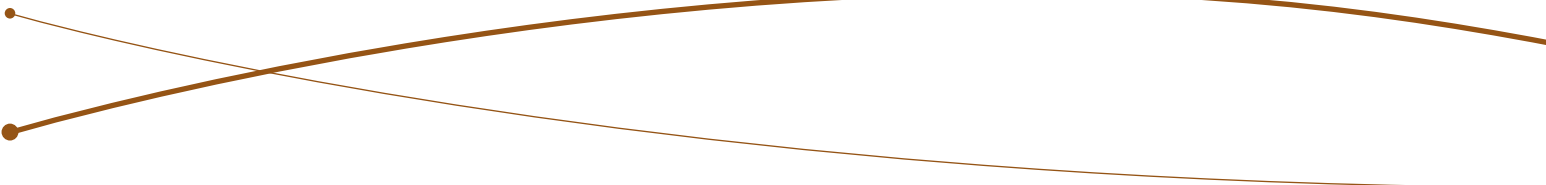
(3) Jurors released from service at a sittings under this section may be resummoned by the sheriff for service at any other sittings, held concurrently with or immediately following the sittings from which they were released. R.S.O. 1990, c. J.3, s. 24 (3).

#### **CONSTITUTION OF PANEL**

(4) Where jurors have been released from service or their service has been postponed under this section, the remaining jurors constitute the panel, and jurors recalled or resummoned under this section form part of the panel to which they are added. R.S.O. 1990, c. J.3, s. 24 (4).

### **SUPERIOR COURT OF JUSTICE MAY ISSUE PRECEPTS AS HERETOFORE**

**25.** Subject to this Act, the Superior Court of Justice and the judges thereof have the same power and authority as heretofore in issuing any precept, or in making any award or order, orally or otherwise, for the return of a jury for the trial of any issue before the court, or for amending or enlarging the panel of jurors returned for the trial of any such issue, and the return to any precept, award or order shall be made in the manner heretofore used and accustomed, and the jurors shall, as heretofore, be returned from the body of the county, and shall be eligible according to this Act. R.S.O. 1990, c. J.3, s. 25; 2006, c. 19, Sched. C, s. 1 (1).





## ACTIONS TRIED BY JURY

### WHEN ACTIONS TO BE ENTERED FOR TRIAL

**26.** Subject to any order of a judge of the Superior Court of Justice, actions to be tried by a jury shall be entered for trial not later than six clear days before the first day of the sittings. R.S.O. 1990, c. J.3, s. 26; 2006, c. 19, Sched. C, s. 1 (1).

## DRAWING JURY AT TRIAL

### EMPANELLING JURY AT THE TRIAL

**27.** (1) The name of every person summoned to attend as a juror, with the person's place of residence, occupation, and number on the panel list, shall be written distinctly by the sheriff on a card or paper, as nearly as may be of the form and size following:

15. DAVID BOOTH  
OF LOT NO. 11, IN THE 7TH CON. OF ALBION  
MERCHANT

and the names so written shall, under the direction of the sheriff, be put together in a container to be provided by the sheriff for that purpose, and he or she shall deliver it to the clerk of the court. R.S.O. 1990, c. J.3, s. 27 (1).

### HOW THE CLERK IS TO PROCEED TO DRAW NAMES

(2) Where an issue is brought on to be tried, or damages are to be assessed by a jury, the clerk shall, in open court, cause the container to be shaken so as sufficiently to mix the names, and shall then draw out six of the cards or papers, one after another, causing the container to be shaken after the drawing of each name, and if any juror whose name is so drawn does not appear or is challenged and set aside, then such further number until six jurors are drawn, who do appear, and who, after all just causes of challenge allowed, remain as fair and indifferent, and the first six jurors so drawn, appearing and approved as indifferent, their names being noted in the minute book of the clerk of the court, shall be sworn, and shall be the jury to try the issue or to assess the damages. R.S.O. 1990, c. J.3, s. 27 (2).

### NAMES DRAWN TO BE KEPT APART, ETC.

(3) The cards or papers containing the names of persons so drawn and sworn shall be kept apart until the jury has given in its verdict, and it has been recorded, or until the jury has been by consent of the parties, or by leave of the court, discharged, and shall then be returned to the container there to be kept with the other cards or papers remaining therein. R.S.O. 1990, c. J.3, s. 27 (3).

### AUTOMATED PROCEDURE FOR EMPANELLING JURY IN CIVIL CASES

**27.1** Where a trial is in respect of a civil proceeding, instead of following the procedure described in section 27 to select a jury, any electronic or other automated procedure may be used to accomplish the same result. 2009, c. 33, Sched. 2, s. 38 (3).

### SELECTION OF JURIES IN ADVANCE

**28.** A jury may be selected in accordance with section 27 or 27.1 at any time before the trial of an issue or assessment of damages directed by the judge presiding at the sittings and shall attend for service upon the summons of the sheriff. R.S.O. 1990, c. J.3, s. 28; 2009, c. 33, Sched. 2, s. 38 (4).

### **SEVERAL CAUSES MAY BE TRIED IN SUCCESSION WITH THE SAME JURY**

**29.** (1) Despite sections 27, 27.1 and 28, unless a party objects, the court may try any issue or assess damages with a jury previously selected to try any other issue or to assess damages. 2009, c. 33, Sched. 2, s. 38 (5).

### **SAME**

(2) Despite subsection (1), unless a party objects, the court may order any juror from the previously selected jury whom both parties consent to withdraw or who may be justly challenged or excused by the court, to retire and may cause another juror to be selected in accordance with section 27 or 27.1, as the case may be, in his or her place, in which case the issue shall be tried or the damages assessed with the remaining members of the previously selected jury and the new juror or jurors, as the case may be, who appear and are approved as indifferent. 2009, c. 33, Sched. 2, s. 38 (5).

### **IF A FULL JURY DOES NOT APPEAR SUPPLEMENTARY JURORS MAY BE APPOINTED**

**30.** (1) Where a full jury does not appear at a sittings for civil matters, or where, after the appearance of a full jury, by challenge of any of the parties, the jury is likely to remain untaken for default of jurors, the court may command the sheriff to name and appoint, as supplementary jurors, so many of such other able persons of the county then present, or who can be found, as will make up a full jury, and the sheriff shall return such persons to serve on the jury. R.S.O. 1990, c. J.3, s. 30 (1).

### **ADDING NAMES OF SUPPLEMENTARY JURORS**

(2) Where a full jury does not appear, the names of the persons so returned shall be added to the panel returned upon the precept. R.S.O. 1990, c. J.3, s. 30 (2).

### **THE SHERIFF TO NOTE ON ROLLS NAMES OF JURORS WHO DO NOT SERVE**

**31.** Immediately after the sittings of the court, the sheriff shall note on the jury roll from which the panel of jurors returned to the sittings was drafted opposite the names of the jurors, the non-attendance or default of every juror who has not attended until discharged by the court. R.S.O. 1990, c. J.3, s. 31.

## **CHALLENGES**

### **LACK OF ELIGIBILITY**

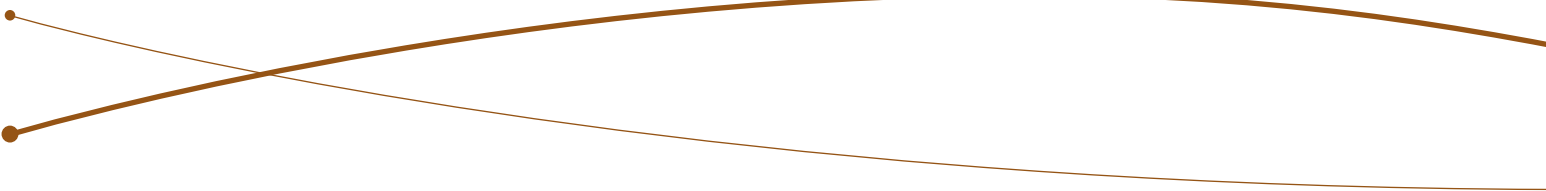
**32.** If a person not eligible is drawn as a juror for the trial of an issue in any proceeding, the want of eligibility is a good cause for challenge. R.S.O. 1990, c. J.3, s. 32.

### **PEREMPTORY CHALLENGES IN CIVIL CASES**

**33.** In any civil proceeding, the plaintiff or plaintiffs, on one side, and the defendant or defendants, on the other, may challenge peremptorily any four of the jurors drawn to serve on the trial, and such right of challenge extends to the Crown when a party. R.S.O. 1990, c. J.3, s. 33.

### **RATEPAYERS, OFFICERS, ETC., OF MUNICIPALITY MAY BE CHALLENGED**

**34.** In a proceeding to which a municipal corporation, other than a county, is a party, every ratepayer, and every officer or servant of the corporation is, for that reason, liable to challenge as a juror. R.S.O. 1990, c. J.3, s. 34.



## GENERAL

### PAYMENTS UNDER *ADMINISTRATION OF JUSTICE ACT*

#### FEES PAYABLE TO JURORS AND JUSTICES OF THE PEACE

- 35.** (1) Such fees and allowances as are prescribed under the *Administration of Justice Act* shall be paid to,
- (a) every juror attending a sittings of the Superior Court of Justice; and
  - (b) the justice of the peace in attendance for each panel drafted under section 16. R.S.O. 1990, c. J.3, s. 35 (1); 2006, c. 19, Sched. C, s. 1 (1).

#### SUMS TO BE PAID WITH RECORD WHEN ENTERED FOR TRIAL IN JURY CASES

- (2) With every record entered for trial of issues or assessment of damages by a jury in the Superior Court of Justice there shall be paid to the local registrar of the Superior Court of Justice such sum as is prescribed under the *Administration of Justice Act*, and the record shall not be entered unless such sum is first paid. R.S.O. 1990, c. J.3, s. 35 (2); 2006, c. 19, Sched. C, s. 1 (1).

### ATTENDANCE AND FEES

#### LIST OF JURORS TO BE CALLED

- 36.** (1) The clerk of the court or the sheriff or sheriff's officer shall, at the opening of the court and before any other business is proceeded with, call the names of the jurors, and the sheriff or sheriff's officer shall record those who are present or absent. R.S.O. 1990, c. J.3, s. 36 (1).

#### RECORD OF FEES PAID

- (2) The sheriff shall keep a record of the payment of fees to jurors for attending sittings of a court. R.S.O. 1990, c. J.3, s. 36 (2).

#### WHEN FEES PAYABLE

- (3) A juror is not entitled to fees or expenses in respect of days that he or she does not or is not required to attend. R.S.O. 1990, c. J.3, s. 36 (3).

### JURY AREAS

- 36.1** (1) A jury area established under clause 37 (c) shall be treated as a separate county for the purposes of this Act. 1994, c. 27, s. 48 (9).

### COURT FACILITIES

- (2) If there are no court facilities in a jury area, a regional senior judge of the Superior Court of Justice may order residents of the jury area who are summoned for jury duty to attend at a court outside the jury area. 1994, c. 27, s. 48 (9); 2006, c. 19, Sched. C, s. 1 (1).

### REGULATIONS

- 37.** The Attorney General may make regulations,
- (a) prescribing any form required or permitted by this Act to be prescribed by the regulations;
  - (b) prescribing the manner of keeping jury rolls and lists of jury panels and records thereof and requiring and prescribing the form of the certification or authentication of entries therein;

(b.1) setting out restrictions or conditions that apply to the collection, use or disclosure of personal information by the sheriff, for the purposes of subsection 18.2 (3);

(b.2) prescribing a police force for the purposes of subsection 18.2 (4);

(c) establishing jury areas, consisting of parts of existing counties, for the purposes of section 36.1. R.S.O. 1990, c. J.3, s. 37; 1994, c. 27, s. 48 (10); 2009, c. 33, Sched. 2, s. 38 (6, 7).

## **OFFENCES**

**38.** (1) Every person who,

(a) wilfully makes or causes to be made any alteration in any roll or panel or in any certified copy thereof except in accordance with this Act;

(b) falsely certifies any roll or panel; or

(c) influences or attempts to influence the selection of persons for inclusion in or omission from any jury roll or panel, except in a proper procedure under this Act,

is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than two years, or to both. R.S.O. 1990, c. J.3, s. 38 (1).

## **IDEM**

(2) Every sheriff, or clerk or registrar of a court, who refuses to perform any duty imposed on him or her by this Act, is guilty of an offence and on conviction is liable to a fine of not more than \$5,000. R.S.O. 1990, c. J.3, s. 38 (2).

## **IDEM**

(3) Every person who is required to complete a return to a jury service notice and who,

(a) without reasonable excuse fails to complete the return or mail it to the sheriff as required by subsection 6(5); or

(b) knowingly gives false or misleading information in the return,

is guilty of an offence and on conviction is liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than six months, or to both. R.S.O. 1990, c. J.3, s. 38 (3).

## **EVIDENCE OF NOT MAILING**

(4) For the purposes of subsection (3), where the sheriff fails to receive a return to a jury service notice within five days from the date on which it was required by this Act to be mailed, such failure is proof, in the absence of evidence to the contrary, that the person required to mail it to the sheriff failed to do so in the time required. R.S.O. 1990, c. J.3, s. 38 (4).

## **CERTIFICATE AS EVIDENCE**

(5) A statement as to the receipt or non-receipt of a return to a jury service notice purporting to be certified by the sheriff is, without proof of the appointment or signature of the sheriff, receivable in evidence as proof, in the absence of evidence to the contrary, of the facts stated therein in any prosecution under subsection (3). R.S.O. 1990, c. J.3, s. 38 (5).

## CONTEMPT OF COURT

**39.** Every person is in contempt of court who, without reasonable excuse,

- (a) having been duly summoned to attend on a jury, does not attend in pursuance of the summons, or being there called does not answer to his or her name; or
- (b) being a juror or supplementary juror, after having been called, is present but does not appear, or after appearing wilfully withdraws from the presence of the court; or
- (c) being a sheriff, wilfully empanels and returns to serve on a jury a person whose name has not been duly drawn upon the panel in the manner prescribed in this Act; or
- (d) being a registrar or other officer wilfully records the appearance of a person so summoned and returned who has not actually appeared. R.S.O. 1990, c. J.3, s. 39.

## IDEM, TAMPERING WITH JURORS

**40.** (1) Every person is in contempt of court who, being interested in an action that is or is to be entered for trial or may be tried in the court, or being the solicitor, counsel, agent or emissary of such person, before or during the sittings or at any time after a juror on the jury panel for such court has been summoned knowingly, directly or indirectly, speaks to or consults with the juror respecting such action or any matter or thing relating thereto. R.S.O. 1990, c. J.3, s. 40 (1).

## REVOCATION OR SUSPENSION OF LICENCE, ETC.

(2) A solicitor, barrister or student-at-law who is guilty of such offence may, in addition to any other penalty, have his or her licence under the *Law Society Act* to practise law or provide legal services revoked or suspended, or his or her name may be erased from the register of the Law Society or removed from the register for a limited time, by the Superior Court of Justice upon motion at the instance and in the name of the Attorney General. 2006, c. 21, Sched. C, s. 114.

## EXCEPTION WHERE JUROR IS A PARTY OR WITNESS

(3) This section does not apply where a juror is also a party to or a known witness or interested in the action or is otherwise ineligible as a juror in the action, nor to anything that may properly take place in the course of the trial or conduct of the action. R.S.O. 1990, c. J.3, s. 40 (3).

## LEAVE OF ABSENCE FROM EMPLOYMENT

**41.** (1) Every employer shall grant to an employee who is summoned for jury service a leave of absence, with or without pay, sufficient for the purpose of the discharge of the employee's duties, and, upon the employee's return, the employer shall reinstate the employee to his or her position, or provide the employee with alternative work of a comparable nature at not less than his or her wages at the time the leave of absence began and without loss of seniority or benefits accrued to the commencement of the leave of absence. R.S.O. 1990, c. J.3, s. 41 (1).

## LIABILITY OF EMPLOYER FOR BREACH

(2) An employer who fails to comply with subsection (1) is liable to the employee for any loss occasioned by the breach of the obligation. R.S.O. 1990, c. J.3, s. 41 (2).

## **PENALTY FOR REPRISALS**

(3) Every employer who, directly or indirectly,

- (a) threatens to cause or causes an employee loss of position, or employment; or
- (b) threatens to impose or imposes on an employee any pecuniary or other penalty,

because of the employee's response to a summons, or service as a juror, is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than three months, or to both. R.S.O. 1990, c. J.3, s. 41 (3).

## **POSTING UP COPIES OF S. 139 (2, 3) OF CRIMINAL CODE**

**42.** The sheriff shall at the sittings of the Superior Court of Justice for trials by jury post up in the court room and jury rooms and in the general entrance hall of the court house printed copies in conspicuous type of subsections 139 (2) and (3) of the *Criminal Code* (Canada) and subsection 40 (1) of this Act. R.S.O. 1990, c. J.3, s. 42; 2006, c. 19, Sched. C, s. 1 (1).

## **SAVING OF FORMER POWERS OF COURT AND JUDGES EXCEPT AS ALTERED**

**43.** Nothing in this Act alters, abridges or affects any power or authority that any court or judge has, or any practice or form in regard to trials by jury, juries or jurors, except in those cases only where such power or authority, practice or form is repealed or altered, or is inconsistent with any of the provisions of this Act. R.S.O. 1990, c. J.3, s. 43.

## **OMISSIONS TO OBSERVE THIS ACT NOT TO VITIATE THE VERDICT**

**44.** (1) The omission to observe any of the provisions of this Act respecting the eligibility, selection, balloting and distribution of jurors, the preparation of the jury roll or the drafting of panels from the jury roll is not a ground for impeaching or quashing a verdict or judgment in any action. R.S.O. 1990, c. J.3, s. 44 (1).

## **PANEL DEEMED PROPERLY SELECTED**

(2) Subject to sections 32 and 34, a jury panel returned by the sheriff for the purposes of this Act shall be deemed to be properly selected for the purposes of the service of the jurors in any matter or proceeding. R.S.O. 1990, c. J.3, s. 44 (2).





# APPENDIX C



# **CORONERS ACT**

## **R.S.O. 1990, CHAPTER C.37**

**CONSOLIDATION PERIOD: FROM JULY 1, 2012 TO THE E-LAWS CURRENCY DATE.**

**LAST AMENDMENT: 2009, C. 33, SCHED. 18, S. 6.**

### **DEFINITIONS**

**1.** (1) In this Act,

“Chief Coroner” means the Chief Coroner for Ontario; (“coroner en chef”)

“Chief Forensic Pathologist” means the Chief Forensic Pathologist for Ontario; (“médecin légiste en chef”)

“Deputy Chief Coroner” means a Deputy Chief Coroner for Ontario; (“coroner en chef adjoint”)

“Deputy Chief Forensic Pathologist” means a Deputy Chief Forensic Pathologist for Ontario; (“médecin légiste en chef adjoint”)

“forensic pathologist” means a pathologist who has been certified by the Royal College of Physicians and Surgeons of Canada in forensic pathology or has received equivalent certification in another jurisdiction; (“médecin légiste”)

“mine” means a mine as defined in the *Occupational Health and Safety Act*; (“mine”)

“mining plant” means a mining plant as defined in the *Occupational Health and Safety Act*; (“installation minière”)

“Minister” means the Solicitor General; (“ministre”)

“Oversight Council” means the Death Investigation Oversight Council established under section 8; (“Conseil de surveillance”)

“pathologist” means a physician who has been certified by the Royal College of Physicians and Surgeons of Canada as a specialist in anatomical or general pathology or has received equivalent certification in another jurisdiction; (“pathologiste”)

“pathologists register” means the register of pathologists maintained under section 71; (“registre des pathologistes”)

“spouse” means a person,

- (a) to whom the deceased was married immediately before his or her death,
- (b) with whom the deceased was living in a conjugal relationship outside marriage immediately before his or her death, if the deceased and the other person,
  - (i) had cohabited for at least one year,
  - (ii) were together the parents of a child, or
  - (iii) had together entered into a cohabitation agreement under section 53 of the *Family Law Act*; (“conjoint”)

“tissue” includes an organ or part of an organ. (“tissu”) R.S.O. 1990, c. C.37, s. 1; 1999, c. 6, s. 15 (1); 2005, c. 5, s. 15 (1, 2); 2009, c. 15, s. 1 (1).

## **INTERPRETATION OF BODY**

(2) A reference in this Act to the body of a person includes part of the body of a person. 2009, c. 15, s. 1 (2).

## **EFFECT OF ACT**

### **REPEAL OF COMMON LAW FUNCTIONS**

2. (1) In so far as it is within the jurisdiction of the Legislature, the common law as it relates to the functions, powers and duties of coroners within Ontario is repealed. R.S.O. 1990, c. C.37, s. 2 (1).

### **INQUEST NOT CRIMINAL COURT OF RECORD**

(2) The powers conferred on a coroner to conduct an inquest shall not be construed as creating a criminal court of record. R.S.O. 1990, c. C.37, s. 2 (2).

## **APPOINTMENT OF CORONERS**

3. (1) The Lieutenant Governor in Council may appoint one or more legally qualified medical practitioners to be coroners for Ontario who, subject to subsections (2), (3) and (4), shall hold office during pleasure. R.S.O. 1990, c. C.37, s. 3 (1).

## **TENURE**

(2) A coroner ceases to hold office on ceasing to be a legally qualified medical practitioner. 2005, c. 29, s. 2.

### **CHIEF CORONER TO BE NOTIFIED**

(3) The College of Physicians and Surgeons of Ontario shall forthwith notify the Chief Coroner where the licence of a coroner for the practice of medicine is revoked, suspended or cancelled. R.S.O. 1990, c. C.37, s. 3 (3).

## **RESIGNATION**

(4) A coroner may resign his or her office in writing. R.S.O. 1990, c. C.37, s. 3 (4).

## **RESIDENTIAL AREAS**

(5) The Lieutenant Governor in Council may by regulation establish areas of Ontario and the appointment and continuation in office of a coroner is subject to the condition that he or she is ordinarily resident in the area named in the appointment. R.S.O. 1990, c. C.37, s. 3 (5).

### **CROWN ATTORNEY NOTIFIED OF APPOINTMENT**

(6) A copy of the order appointing a coroner shall be sent by the Minister to the Crown Attorney of any area in which the coroner will ordinarily act. R.S.O. 1990, c. C.37, s. 3 (6).

## **APPOINTMENTS CONTINUED**

(7) All persons holding appointments as coroners under *The Coroners Act*, being chapter 87 of the Revised Statutes of Ontario, 1970, shall be deemed to have been appointed in accordance with this Act. R.S.O. 1990, c. C.37, s. 3 (7).

## **CHIEF CORONER AND DUTIES**

4. (1) The Lieutenant Governor in Council may appoint a coroner to be Chief Coroner for Ontario who shall,
- (a) administer this Act and the regulations;
  - (b) supervise, direct and control all coroners in Ontario in the performance of their duties;
  - (c) conduct programs for the instruction of coroners in their duties;
  - (d) bring the findings and recommendations of coroners' investigations and coroners' juries to the attention of appropriate persons, agencies and ministries of government;
  - (e) prepare, publish and distribute a code of ethics for the guidance of coroners;
  - (f) perform such other duties as are assigned to him or her by or under this or any other Act or by the Lieutenant Governor in Council. R.S.O. 1990, c. C.37, s. 4 (1); 2009, c. 15, s. 2 (1, 2).

## **DEPUTY CHIEF CORONERS**

(2) The Lieutenant Governor in Council may appoint one or more coroners to be Deputy Chief Coroners for Ontario and a Deputy Chief Coroner shall act as and have all the powers and authority of the Chief Coroner if the Chief Coroner is absent or unable to act or if the Chief Coroner's position is vacant. 2009, c. 15, s. 2 (3).

## **DELEGATION**

(3) The Chief Coroner may delegate in writing any of his or her powers and duties under this Act to a Deputy Chief Coroner, subject to any limitations, conditions and requirements set out in the delegation. 2009, c. 15, s. 2 (4).

## **REGIONAL CORONERS**

5. (1) The Lieutenant Governor in Council may appoint a coroner as a regional coroner for such region of Ontario as is described in the appointment. R.S.O. 1990, c. C.37, s. 5 (1).

## **DUTIES**

(2) A regional coroner shall assist the Chief Coroner in the performance of his or her duties in the region and shall perform such other duties as are assigned to him or her by the Chief Coroner. R.S.O. 1990, c. C.37, s. 5 (2).

## **ONTARIO FORENSIC PATHOLOGY SERVICE**

6. The Minister shall establish the Ontario Forensic Pathology Service, to be known in French as Service de médecine légale de l'Ontario, the function of which shall be to facilitate the provision of pathologists' services under this Act. 2009, c. 15, s. 3.

## **CHIEF FORENSIC PATHOLOGIST AND DEPUTIES**

7. (1) The Lieutenant Governor in Council may appoint a forensic pathologist to be Chief Forensic Pathologist for Ontario who shall,
- (a) be responsible for the administration and operation of the Ontario Forensic Pathology Service;
  - (b) supervise and direct pathologists in the provision of services under this Act;
  - (c) conduct programs for the instruction of pathologists who provide services under this Act;

- (d) prepare, publish and distribute a code of ethics for the guidance of pathologists in the provision of services under this Act;
- (e) perform such other duties as are assigned to him or her by or under this or any other Act or by the Lieutenant Governor in Council. 2009, c. 15, s. 3.

### **DEPUTY CHIEF FORENSIC PATHOLOGISTS**

(2) The Lieutenant Governor in Council may appoint one or more forensic pathologists to be Deputy Chief Forensic Pathologists for Ontario and a Deputy Chief Forensic Pathologist shall act as and have all the powers and authority of the Chief Forensic Pathologist if the Chief Forensic Pathologist is absent or unable to act or if the Chief Forensic Pathologist's position is vacant. 2009, c. 15, s. 3.

### **DELEGATION**

(3) The Chief Forensic Pathologist may delegate in writing any of his or her powers and duties under this Act to a Deputy Chief Forensic Pathologist, subject to any limitations, conditions and requirements set out in the delegation. 2009, c. 15, s. 3.

### **PATHOLOGISTS REGISTER**

**7.1** (1) The Chief Forensic Pathologist shall maintain a register of pathologists who are authorized by the Chief Forensic Pathologist to provide services under this Act. 2009, c. 15, s. 3.

### **NOTIFICATION RE LOSS OF MEDICAL LICENCE**

(2) The College of Physicians and Surgeons of Ontario shall forthwith notify the Chief Forensic Pathologist if the licence for the practice of medicine of a pathologist who is on the pathologists register is revoked, suspended or cancelled. 2009, c. 15, s. 3.

### **OVERSIGHT COUNCIL**

**8.** (1) There is hereby established a council to be known in English as the Death Investigation Oversight Council and in French as Conseil de surveillance des enquêtes sur les décès. 2009, c. 15, s. 4.

### **MEMBERSHIP**

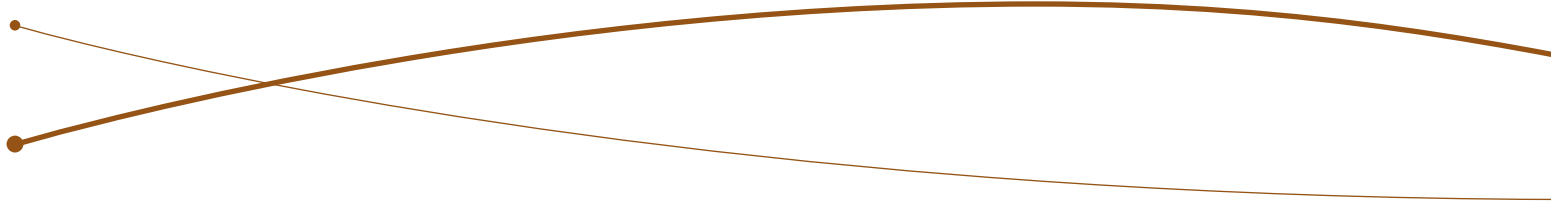
(2) The composition of the Oversight Council shall be as provided in the regulations, and the members shall be appointed by the Lieutenant Governor in Council. 2009, c. 15, s. 4.

### **CHAIR, VICE-CHAIRS**

(3) The Lieutenant Governor in Council may designate one of the members of the Oversight Council to be the chair and one or more members of the Oversight Council to be vice-chairs and a vice-chair shall act as and have all the powers and authority of the chair if the chair is absent or unable to act or if the chair's position is vacant. 2009, c. 15, s. 4.

### **EMPLOYEES**

(4) Such employees as are considered necessary for the proper conduct of the affairs of the Oversight Council may be appointed under Part III of the *Public Service of Ontario Act, 2006*. 2009, c. 15, s. 4.





## **DELEGATION**

(5) The chair may authorize one or more members of the Oversight Council to exercise any of the Oversight Council's powers and perform any of its duties. 2009, c. 15, s. 4.

## **QUORUM**

(6) The chair shall determine the number of members of the Oversight Council that constitutes a quorum for any purpose. 2009, c. 15, s. 4.

## **ANNUAL REPORT**

(7) At the end of each calendar year, the Oversight Council shall submit an annual report on its activities, including its activities under subsection 8.1 (1), to the Minister, who shall submit the report to the Lieutenant Governor in Council and shall then lay the report before the Assembly. 2009, c. 15, s. 4.

## **ADDITIONAL REPORTS**

(8) The Minister may request additional reports from the Oversight Council on its activities, including its activities under subsection 8.1 (1), at any time and the Oversight Council shall submit such reports as requested and may also submit additional reports on the same matters at any time on its own initiative. 2009, c. 15, s. 4.

## **EXPENSES**

(9) The money required for the Oversight Council's purposes shall be paid out of the amounts appropriated by the Legislature for that purpose. 2009, c. 15, s. 4.

## **FUNCTIONS OF OVERSIGHT COUNCIL**

### **ADVICE AND RECOMMENDATIONS TO CHIEF CORONER AND CHIEF FORENSIC PATHOLOGIST**

**8.1** (1) The Oversight Council shall oversee the Chief Coroner and the Chief Forensic Pathologist by advising and making recommendations to them on the following matters:

1. Financial resource management.
2. Strategic planning.
3. Quality assurance, performance measures and accountability mechanisms.
4. Appointment and dismissal of senior personnel.
5. The exercise of the power to refuse to review complaints under subsection 8.4 (10).
6. Compliance with this Act and the regulations.
7. Any other matter that is prescribed. 2009, c. 15, s. 4.

## **REPORTS TO OVERSIGHT COUNCIL**

(2) The Chief Coroner and the Chief Forensic Pathologist shall report to the Oversight Council on the matters set out in subsection (1), as may be requested by the Oversight Council. 2009, c. 15, s. 4.

## **ADVICE AND RECOMMENDATIONS TO MINISTER**

(3) The Oversight Council shall advise and make recommendations to the Minister on the appointment and dismissal of the Chief Coroner and the Chief Forensic Pathologist. 2009, c. 15, s. 4.

## COMPLAINTS COMMITTEE

**8.2** (1) There shall be a complaints committee of the Oversight Council composed, in accordance with the regulations, of members of the Oversight Council appointed by the chair of the Oversight Council. 2009, c. 15, s. 4.

## CHAIR

(2) The chair of the Oversight Council shall designate one member of the complaints committee to be the chair of the committee. 2009, c. 15, s. 4.

## DELEGATION

(3) The chair of the complaints committee may delegate any of the functions of the committee to one or more members of the committee. 2009, c. 15, s. 4.

## QUORUM

(4) The chair of the complaints committee shall determine the number of members of the complaints committee that constitutes a quorum for any purpose, and may determine that one member constitutes a quorum. 2009, c. 15, s. 4.

## CONFIDENTIALITY

**8.3** (1) Every member and employee of the Oversight Council and of the complaints committee shall keep confidential all information that comes to his or her knowledge in the course of performing his or her duties under this Act. 2009, c. 15, s. 4.

## EXCEPTION

(2) An individual described in subsection (1) may disclose confidential information for the purposes of the administration of this Act or the *Regulated Health Professions Act, 1991* or as otherwise required by law. 2009, c. 15, s. 4.

## COMPLAINTS

### RIGHT TO MAKE A COMPLAINT

**8.4** (1) Any person may make a complaint to the complaints committee about a coroner, a pathologist or a person, other than a coroner or pathologist, with powers or duties under section 28. 2009, c. 15, s. 4.

### FORM OF COMPLAINT

(2) The complaint must be in writing. 2009, c. 15, s. 4.

### MATTERS THAT MAY NOT BE THE SUBJECT OF A COMPLAINT

(3) A complaint about the following matters shall not be dealt with under this section:

1. A coroner's decision to hold an inquest or to not hold an inquest.
2. A coroner's decision respecting the scheduling of an inquest.
3. A coroner's decision relating to the conduct of an inquest, including a decision made while presiding at the inquest. 2009, c. 15, s. 4.

### **COMPLAINTS ABOUT CORONERS**

(4) Subject to subsection (8), the complaints committee shall refer every complaint about a coroner, other than the Chief Coroner, to the Chief Coroner and the Chief Coroner shall review every such complaint. 2009, c. 15, s. 4.

### **COMPLAINTS ABOUT PATHOLOGISTS**

(5) Subject to subsection (8), the complaints committee shall refer every complaint about a pathologist, other than the Chief Forensic Pathologist, to the Chief Forensic Pathologist and the Chief Forensic Pathologist shall review every such complaint. 2009, c. 15, s. 4.

### **COMPLAINTS ABOUT CHIEFS**

(6) Subject to subsection (8), the complaints committee shall review every complaint made about the Chief Coroner or the Chief Forensic Pathologist. 2009, c. 15, s. 4.

### **REFERRAL TO OTHER PERSONS OR BODIES**

(7) The complaints committee shall refer every complaint about a person, other than a coroner or pathologist, with powers or duties under section 28 to a person or organization that has power to deal with the complaint and that the committee considers is the appropriate person or organization to deal with the complaint. 2009, c. 15, s. 4.

### **SAME**

(8) If the complaints committee is of the opinion that a complaint about a coroner or pathologist is more appropriately dealt with by the College of Physicians and Surgeons of Ontario or another person or organization that has power to deal with the complaint, the complaints committee shall refer the complaint to the College or that other person or organization. 2009, c. 15, s. 4.

### **NOTICE OF REFERRAL**

(9) If the complaints committee refers a complaint to the College of Physicians and Surgeons of Ontario or another person or organization under subsection (8), the committee shall promptly give notice in writing to the complainant, the coroner or pathologist who is the subject of the complaint, and the Oversight Council. 2009, c. 15, s. 4.

### **REFUSAL TO REVIEW A COMPLAINT**

(10) Despite subsections (4) and (5), the Chief Coroner and the Chief Forensic Pathologist may refuse to review a complaint referred to him or her if, in his or her opinion,

- (a) the complaint is trivial or vexatious or not made in good faith;
- (b) the complaint does not relate to a power or duty of a coroner or a pathologist under this Act; or
- (c) the complainant was not directly affected by the exercise or performance of, or the failure to exercise or perform, the power or duty to which the complaint relates. 2009, c. 15, s. 4.

### **SAME**

(11) Despite subsection (6), the complaints committee may refuse to review a complaint if, in its opinion,

- (a) the complaint is trivial or vexatious or not made in good faith;
- (b) the complaint does not relate to a power or duty of the Chief Coroner or the Chief Forensic Pathologist; or
- (c) the complainant was not directly affected by the exercise or performance of, or the failure to exercise or perform, the power or duty to which the complaint relates. 2009, c. 15, s. 4.

### **REPORTS AFTER REVIEW OR DECISION TO NOT REVIEW**

(12) The Chief Coroner and the Chief Forensic Pathologist shall, promptly after completing his or her review of a complaint referred to him or her or deciding to not review the complaint, report in writing to the complainant, the person who is the subject of the complaint and the complaints committee on the results of the review or the decision to not review the complaint, as the case may be. 2009, c. 15, s. 4.

### **SAME**

(13) The complaints committee shall, promptly after completing its review of a complaint or deciding to not review the complaint, report in writing to the complainant, the person who is the subject of the complaint, the Oversight Council and the Minister on the results of the review or the decision to not review the complaint, as the case may be. 2009, c. 15, s. 4.

### **REQUEST FOR REVIEW BY COMPLAINTS COMMITTEE**

(14) If a complaint is made about a coroner or pathologist, other than the Chief Coroner or the Chief Forensic Pathologist, and the complainant or the coroner or pathologist who is the subject of the complaint is not satisfied with the results of the review of the complaint or the decision to not review the complaint by the Chief Coroner or the Chief Forensic Pathologist, he or she may request in writing that the complaints committee review the complaint and the complaints committee shall review the complaint and shall, promptly after completing its review or deciding to not review the complaint, report in writing to the complainant, the person who is the subject of the complaint and the Chief Coroner or the Chief Forensic Pathologist, as appropriate, on the results of the review or the decision to not review the complaint, as the case may be. 2009, c. 15, s. 4.

### **REFUSAL TO REVIEW A COMPLAINT ON REQUEST**

(15) The complaints committee may refuse to review a complaint pursuant to a request made under subsection (14) if, in its opinion,

- (a) the complaint is trivial or vexatious or not made in good faith;
- (b) the complaint does not relate to a power or duty of a coroner or a pathologist under this Act; or
- (c) the complainant was not directly affected by the exercise or performance of, or the failure to exercise or perform, the power or duty to which the complaint relates. 2009, c. 15, s. 4.

### **ANNUAL REPORTS TO OVERSIGHT COUNCIL**

(16) The complaints committee shall submit an annual report on its activities to the Oversight Council at the end of each calendar year. 2009, c. 15, s. 4.

## **ADDITIONAL REPORTS**

(17) The Oversight Council may request additional reports from the complaints committee on its activities or on a specific complaint or complaints about a specific person at any time and the complaints committee shall submit such reports as requested and may also submit additional reports as described at any time on its own initiative. 2009, c. 15, s. 4.

## **POLICE ASSISTANCE**

**9.** (1) The police force having jurisdiction in the locality in which a coroner has jurisdiction shall make available to the coroner the assistance of such police officers as are necessary for the purpose of carrying out the coroner's duties. 2009, c. 15, s. 5.

## **SAME**

(2) The Chief Coroner in any case he or she considers appropriate may request that another police force or the criminal investigation branch of the Ontario Provincial Police provide assistance to a coroner in an investigation or inquest. 2009, c. 15, s. 5.

## **DUTY TO GIVE INFORMATION**

**10.** (1) Every person who has reason to believe that a deceased person died,

(a) as a result of,

(i) violence,

(ii) misadventure,

(iii) negligence,

(iv) misconduct, or

(v) malpractice;

(b) by unfair means;

(c) during pregnancy or following pregnancy in circumstances that might reasonably be attributable thereto;

(d) suddenly and unexpectedly;

(e) from disease or sickness for which he or she was not treated by a legally qualified medical practitioner;

(f) from any cause other than disease; or

(g) under such circumstances as may require investigation,

shall immediately notify a coroner or a police officer of the facts and circumstances relating to the death, and where a police officer is notified he or she shall in turn immediately notify the coroner of such facts and circumstances. R.S.O. 1990, c. C.37, s. 10 (1).

## **DEATHS TO BE REPORTED**

(2) Where a person dies while resident or an in-patient in,

(a) Repealed: 2007, c. 8, s. 201 (1).

(b) a children's residence under Part IX (Licensing) of the *Child and Family Services Act* or premises approved under subsection 9 (1) of Part I (Flexible Services) of that Act;

(c) Repealed: 1994, c. 27, s. 136 (1).

(d) a supported group living residence or an intensive support residence under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*;

(e) a psychiatric facility designated under the *Mental Health Act*;

(f) Repealed: 2009, c. 33, Sched. 18, s. 6.

(g) Repealed: 1994, c. 27, s. 136 (1).

(h) a public or private hospital to which the person was transferred from a facility, institution or home referred to in clauses (a) to (g),

the person in charge of the hospital, facility, institution, residence or home shall immediately give notice of the death to a coroner, and the coroner shall investigate the circumstances of the death and, if as a result of the investigation he or she is of the opinion that an inquest ought to be held, the coroner shall hold an inquest upon the body. R.S.O. 1990, c. C.37, s. 10 (2); 1994, c. 27, s. 136 (1); 2001, c. 13, s. 10; 2007, c. 8, s. 201 (1); 2008, c. 14, s. 50; 2009, c. 15, s. 6 (1); 2009, c. 33, Sched. 8, s. 11; 2009, c. 33, Sched. 18, s. 6.

### DEATHS IN LONG-TERM CARE HOMES

(2.1) Where a person dies while resident in a long-term care home to which the *Long-Term Care Homes Act, 2007* applies, the person in charge of the home shall immediately give notice of the death to a coroner and, if the coroner is of the opinion that the death ought to be investigated, he or she shall investigate the circumstances of the death and if, as a result of the investigation, he or she is of the opinion that an inquest ought to be held, the coroner shall hold an inquest upon the body. 2007, c. 8, s. 201 (2); 2009, c. 15, s. 6 (3).

### DEATHS OFF PREMISES OF PSYCHIATRIC FACILITIES, CORRECTIONAL INSTITUTIONS, YOUTH CUSTODY FACILITIES

(3) Where a person dies while,

(a) a patient of a psychiatric facility;

(b) committed to a correctional institution;

(c) committed to a place of temporary detention under the *Youth Criminal Justice Act* (Canada); or

(d) committed to secure or open custody under section 24.1 of the *Young Offenders Act* (Canada), whether in accordance with section 88 of the *Youth Criminal Justice Act* (Canada) or otherwise,

but while not on the premises or in actual custody of the facility, institution or place, as the case may be, subsection (2) applies as if the person were a resident of an institution named in subsection (2). 2009, c. 15, s. 6 (4).

### DEATH ON PREMISES OF DETENTION FACILITY OR LOCK-UP

(4) Where a person dies while detained in and on the premises of a detention facility established under section 16.1 of the *Police Services Act* or a lock-up, the officer in charge of the facility or lock-up shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. 2009, c. 15, s. 6 (4).



### **DEATH ON PREMISES OF PLACE OF TEMPORARY DETENTION**

(4.1) Where a person dies while committed to and on the premises of a place of temporary detention under the *Youth Criminal Justice Act* (Canada), the officer in charge of the place shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. 2009, c. 15, s. 6 (4).

### **DEATH ON PREMISES OF PLACE OF SECURE CUSTODY**

(4.2) Where a person dies while committed to and on the premises of a place or facility designated as a place of secure custody under section 24.1 of the *Young Offenders Act* (Canada), whether in accordance with section 88 of the *Youth Criminal Justice Act* (Canada) or otherwise, the officer in charge of the place or facility shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. 2009, c. 15, s. 6 (4).

### **DEATH ON PREMISES OF CORRECTIONAL INSTITUTION**

(4.3) Where a person dies while committed to and on the premises of a correctional institution, the officer in charge of the institution shall immediately give notice of the death to a coroner and the coroner shall investigate the circumstances of the death and shall hold an inquest upon the body if as a result of the investigation he or she is of the opinion that the person may not have died of natural causes. 2009, c. 15, s. 6 (4).

### **NON-APPLICATION OF SUBS. (4.3)**

(4.4) If a person dies in circumstances referred to in subsection (4), (4.1) or (4.2) on the premises of a lock-up, place of temporary detention or place or facility designated as a place of secure custody that is located in a correctional institution, subsection (4.3) does not apply. 2009, c. 15, s. 6 (4).

### **DEATH IN CUSTODY OFF PREMISES OF CORRECTIONAL INSTITUTION**

(4.5) Where a person dies while committed to a correctional institution, while off the premises of the institution and while in the actual custody of a person employed at the institution, the officer in charge of the institution shall immediately give notice of the death to a coroner and the coroner shall investigate the circumstances of the death and shall hold an inquest upon the body if as a result of the investigation he or she is of the opinion that the person may not have died of natural causes. 2009, c. 15, s. 6 (4).

### **OTHER DEATHS IN CUSTODY**

(4.6) If a person dies while detained by or in the actual custody of a peace officer and subsections (4), (4.1), (4.2), (4.3) and (4.5) do not apply, the peace officer shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. 2009, c. 15, s. 6 (4).

### **DEATH WHILE RESTRAINED ON PREMISES OF PSYCHIATRIC FACILITY, ETC.**

(4.7) Where a person dies while being restrained and while detained in and on the premises of a psychiatric facility within the meaning of the *Mental Health Act* or a hospital within the meaning of Part XX.1 (Mental Disorder) of the *Criminal Code* (Canada), the officer in charge of the psychiatric facility or the person in charge of the hospital, as the case may be, shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. 2009, c. 15, s. 6 (4).

### **DEATH WHILE RESTRAINED IN SECURE TREATMENT PROGRAM**

(4.8) Where a person dies while being restrained and while committed or admitted to a secure treatment program within the meaning of Part VI of the *Child and Family Services Act*, the person in charge of the program shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. 2009, c. 15, s. 6 (4).

## **NOTICE OF DEATH RESULTING FROM ACCIDENT AT OR IN CONSTRUCTION PROJECT, MINING PLANT OR MINE**

(5) Where a worker dies as a result of an accident occurring in the course of the worker's employment at or in a construction project, mining plant or mine, including a pit or quarry, the person in charge of such project, mining plant or mine shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. R.S.O. 1990, c. C.37, s. 10 (5); 2009, c. 15, s. 6 (5).

## **CERTIFICATE AS EVIDENCE**

(6) A statement as to the notification or non-notification of a coroner under this section, purporting to be certified by the coroner is without proof of the appointment or signature of the coroner, receivable in evidence as proof, in the absence of evidence to the contrary of the facts stated therein for all purposes in any action, proceeding or prosecution. R.S.O. 1990, c. C.37, s. 10 (6).

## **INTERFERENCE WITH BODY**

**11.** No person who has reason to believe that a person died in any of the circumstances mentioned in section 10 shall interfere with or alter the body or its condition in any way until the coroner so directs by a warrant. R.S.O. 1990, c. C.37, s. 11.

## **POWER OF CORONER TO TAKE CHARGE OF WRECKAGE**

**12.** (1) Where a coroner has issued a warrant to take possession of the body of a person who has met death by violence in a wreck, the coroner may, with the approval of the Chief Coroner, take charge of the wreckage and place one or more police officers in charge of it so as to prevent persons from disturbing it until the jury at the inquest has viewed it, or the coroner has made such examination as he or she considers necessary. R.S.O. 1990, c. C.37, s. 12 (1).

## **VIEW TO BE EXPEDITED**

(2) The jury or coroner, as the case may be, shall view the wreckage at the earliest moment possible. R.S.O. 1990, c. C.37, s. 12 (2).

## **SHIPMENT OF BODIES OUTSIDE ONTARIO**

**13.** (1) Subject to section 14, no person shall accept for shipment or ship or take a dead body from any place in Ontario to any place outside Ontario unless a certificate of a coroner has been obtained certifying that there exists no reason for further examination of the body. R.S.O. 1990, c. C.37, s. 13 (1).

## **FEE FOR CERTIFICATE**

(2) An applicant for a certificate under subsection (1) shall pay to the coroner such fee as is prescribed therefor. R.S.O. 1990, c. C.37, s. 13 (2).

## **EMBALMING, ETC., PROHIBITED**

(3) No person who has reason to believe that a dead body will be shipped or taken to a place outside Ontario shall embalm or make any alteration to the body or apply any chemical to the body, internally or externally, until the certificate required by subsection (1) has been issued. R.S.O. 1990, c. C.37, s. 13 (3).

## **TRANSPORTATION OF A BODY OUT OF ONTARIO FOR POST MORTEM**

**14.** A coroner may in writing authorize the transportation of a body out of Ontario for *post mortem* examination and, in such case a provision in any Act or regulation requiring embalming and preparation by a funeral director does not apply. R.S.O. 1990, c. C.37, s. 14.



## **CORONER'S INVESTIGATION**

**15.** (1) Where a coroner is informed that there is in his or her jurisdiction the body of a person and that there is reason to believe that the person died in any of the circumstances mentioned in section 10, the coroner shall issue a warrant to take possession of the body and shall examine the body and make such investigation as, in the opinion of the coroner, is necessary in the public interest to enable the coroner,

- (a) to determine the answers to the questions set out in subsection 31 (1);
- (b) to determine whether or not an inquest is necessary; and
- (c) to collect and analyze information about the death in order to prevent further deaths in similar circumstances. 2009, c. 15, s. 7 (1).

## **IDEM**

(2) Where the Chief Coroner has reason to believe that a person died in any of the circumstances mentioned in section 10 and no warrant has been issued to take possession of the body, he or she may issue the warrant or direct any coroner to do so. R.S.O. 1990, c. C.37, s. 15 (2).

## **JURISDICTION**

(3) After the issue of the warrant, no other coroner shall issue a warrant or interfere in the case, except the Chief Coroner. R.S.O. 1990, c. C.37, s. 15 (3); 2009, c. 15, s. 7 (2).

## **EXPERT ASSISTANCE**

(4) Subject to the approval of the Chief Coroner, a coroner may obtain assistance or retain expert services for all or any part of his or her investigation or inquest. R.S.O. 1990, c. C.37, s. 15 (4).

## **NO WARRANT**

(5) A coroner may proceed with an investigation without taking possession of the body where the body has been destroyed in whole or in part or is lying in a place from which it cannot be recovered or has been removed from Ontario. R.S.O. 1990, c. C.37, s. 15 (5).

## **INVESTIGATIVE POWERS**

**16.** (1) A coroner may,

- (a) examine or take possession of any dead body, or both; and
- (b) enter and inspect any place where a dead body is and any place from which the coroner has reasonable grounds for believing the body was removed. R.S.O. 1990, c. C.37, s. 16 (1); 2009, c. 15, s. 8.

## **IDEM**

(2) A coroner who believes on reasonable and probable grounds that to do so is necessary for the purposes of the investigation may,

- (a) inspect any place in which the deceased person was, or in which the coroner has reasonable grounds to believe the deceased person was, prior to his or her death;
- (b) inspect and extract information from any records or writings relating to the deceased or his or her circumstances and reproduce such copies therefrom as the coroner believes necessary;
- (c) seize anything that the coroner has reasonable grounds to believe is material to the purposes of the investigation. R.S.O. 1990, c. C.37, s. 16 (2).

## **DELEGATION OF POWERS**

(3) A coroner may authorize a legally qualified medical practitioner or a police officer to exercise all or any of the coroner's powers under subsection (1). R.S.O. 1990, c. C.37, s. 16 (3).

## **IDEM**

(4) A coroner may, where in his or her opinion it is necessary for the purposes of the investigation, authorize a legally qualified medical practitioner or a police officer to exercise all or any of the coroner's powers under clauses (2) (a), (b) and (c) but, where such power is conditional on the belief of the coroner, the requisite belief shall be that of the coroner personally. R.S.O. 1990, c. C.37, s. 16 (4).

## **RETURN OF THINGS SEIZED**

(5) Where a coroner seizes anything under clause (2) (c), he or she shall place it in the custody of a police officer for safekeeping and shall return it to the person from whom it was seized as soon as is practicable after the conclusion of the investigation or, where there is an inquest, of the inquest, unless the coroner is authorized or required by law to dispose of it otherwise. R.S.O. 1990, c. C.37, s. 16 (5).

## **OBSTRUCTION OF CORONER**

(6) No person shall knowingly,

- (a) hinder, obstruct or interfere with or attempt to hinder, obstruct or interfere with; or
- (b) furnish with false information or refuse or neglect to furnish information to,

a coroner in the performance of his or her duties or a person authorized by the coroner in connection with an investigation. R.S.O. 1990, c. C.37, s. 16 (6).

## **APPOINTMENT OF PERSONS WITH CORONERS' INVESTIGATIVE POWERS AND DUTIES**

**16.1** (1) The Chief Coroner may appoint any person, in accordance with the regulations, to exercise the investigative powers and duties of a coroner. 2009, c. 15, s. 9.

## **SAME**

(2) Subject to subsection (3) and the regulations, this Act applies with necessary modifications to a person appointed under subsection (1) as if he or she were a coroner. 2009, c. 15, s. 9.

## **LIMITATION**

(3) A person appointed under subsection (1) cannot determine whether or not an inquest is necessary or hold an inquest. 2009, c. 15, s. 9.

## **REPORT**

(4) A person appointed under subsection (1) shall report his or her findings to the Chief Coroner or a coroner specified by the Chief Coroner, who shall then determine whether or not an inquest is necessary. 2009, c. 15, s. 9.

## **TRANSFER OF INVESTIGATION**

**17.** (1) A coroner may at any time transfer an investigation to another coroner where in his or her opinion the investigation may be continued or conducted more conveniently by that other coroner or for any other good and sufficient reason. R.S.O. 1990, c. C.37, s. 17 (1).



## INVESTIGATION AND INQUEST

(2) The coroner to whom an investigation is transferred shall proceed with the investigation in the same manner as if he or she had issued the warrant to take possession of the body. R.S.O. 1990, c. C.37, s. 17 (2).

## NOTIFICATION OF CHIEF CORONER

(3) The coroner who transfers an investigation to another coroner shall notify the Chief Coroner of the transfer, and the Chief Coroner shall assist in the transfer upon request. R.S.O. 1990, c. C.37, s. 17 (3).

## TRANSMITTING RESULTS OF FIRST INVESTIGATION

(4) The coroner who transfers an investigation to another coroner shall transmit to that other coroner the report of the *post mortem* examination of the body, if any, and his or her signed statement setting forth briefly the result of his or her investigation and any evidence to prove the fact of death and the identity of the body. R.S.O. 1990, c. C.37, s. 17 (4).

## INQUEST UNNECESSARY

**18.** (1) Where the coroner determines that an inquest is unnecessary, the coroner shall forthwith transmit to the Chief Coroner a signed statement setting forth briefly the results of the investigation, and shall also forthwith transmit to the division registrar a notice of the death in the form prescribed by the *Vital Statistics Act*. 2009, c. 15, s. 10.

## RECOMMENDATIONS

(2) The coroner may make recommendations to the Chief Coroner with respect to the prevention of deaths in circumstances similar to those of the death that was the subject of the coroner's investigation. 2009, c. 15, s. 10.

## DISCLOSURE TO THE PUBLIC

(3) The Chief Coroner shall bring the findings and recommendations of a coroner's investigation, which may include personal information as defined in the *Freedom of Information and Protection of Privacy Act*, to the attention of the public, or any segment of the public, if the Chief Coroner reasonably believes that it is necessary in the interests of public safety to do so. 2009, c. 15, s. 10.

## RECORD OF INVESTIGATIONS

(4) Every coroner shall keep a record of the cases reported in which an inquest has been determined to be unnecessary, showing for each case the coroner's findings of facts to determine the answers to the questions set out in subsection 31 (1), and such findings, including the relevant findings of the *post mortem* examination and of any other examinations or analyses of the body carried out, shall be available to the spouse, parents, children, brothers and sisters of the deceased and to his or her personal representative, upon request. 2009, c. 15, s. 10.

## CORONER'S REPORT IF DEATH SUSPECTED NOT OF NATURAL CAUSES

**18.1** If the coroner is of the opinion, based on his or her investigation, that the deceased person may not have died of natural causes, the coroner shall advise the regional coroner of that opinion and the regional coroner shall so advise the Crown Attorney. 2009, c. 15, s. 11.

## **DETERMINATION TO HOLD AN INQUEST**

**19.** Where the coroner determines that an inquest is necessary, the coroner shall,

- (a) forthwith notify the Chief Coroner of that determination and give the Chief Coroner a brief summary of the results of the investigation and of the grounds upon which the coroner made that determination; and
- (b) hold an inquest. 2009, c. 15, s. 12.

## **WHAT CORONER SHALL CONSIDER AND HAVE REGARD TO**

**20.** When making a determination whether an inquest is necessary or unnecessary, the coroner shall have regard to whether the holding of an inquest would serve the public interest and, without restricting the generality of the foregoing, shall consider,

- (a) whether the matters described in clauses 31 (1) (a) to (e) are known;
- (b) the desirability of the public being fully informed of the circumstances of the death through an inquest; and
- (c) the likelihood that the jury on an inquest might make useful recommendations directed to the avoidance of death in similar circumstances. R.S.O. 1990, c. C.37, s. 20.

## **WHERE BODY DESTROYED OR REMOVED FROM ONTARIO**

**21.** Where a coroner has reason to believe that a death has occurred in circumstances that warrant the holding of an inquest but, owing to the destruction of the body in whole or in part or to the fact that the body is lying in a place from which it cannot be recovered, or that the body has been removed from Ontario, an inquest cannot be held except by virtue of this section, he or she shall report the facts to the Chief Coroner who may direct an inquest to be held touching the death, in which case an inquest shall be held by the coroner making the report or by such other coroner as the Chief Coroner directs, and the law relating to coroners and coroners' inquests applies with such modifications as are necessary in consequence of the inquest being held otherwise than on or after a view of the body. R.S.O. 1990, c. C.37, s. 21.

**22.** Repealed: 2009, c. 15, s. 13.

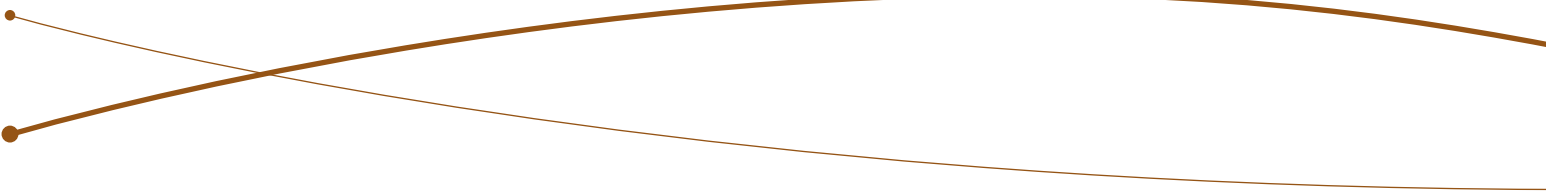
## **INQUEST MANDATORY**

**22.1** A coroner shall hold an inquest under this Act into the death of a child upon learning that the child died in the circumstances described in clauses 72.2 (a), (b) and (c) of the *Child and Family Services Act*. 2006, c. 24, s. 2 (1).

**23.** Repealed: 2009, c. 15, s. 14.

## **CHIEF CORONER MAY DIRECT THAT BODY BE DISINTERRED**

**24.** Despite anything in the *Funeral, Burial and Cremation Services Act*, 2002 or a regulation made under that Act, the Chief Coroner may, at any time where he or she considers it necessary for the purposes of an investigation or an inquest, direct that a body be disinterred under and subject to such conditions as the Chief Coroner considers proper. R.S.O. 1990, c. C.37, s. 24; 2002, c. 33, s. 142; 2009, c. 15, s. 15.





### **DIRECTION BY CHIEF CORONER**

**25.** (1) The Chief Coroner may direct any coroner in respect of any death to issue a warrant to take possession of the body, conduct an investigation or hold an inquest, or may direct any other coroner to do so or may intervene to act as coroner personally for any one or more of such purposes. R.S.O. 1990, c. C.37, s. 25 (1).

### **INQUEST INTO MULTIPLE DEATHS**

(2) Where two or more deaths appear to have occurred in the same event or from a common cause, the Chief Coroner may direct that one inquest be held into all of the deaths. R.S.O. 1990, c. C.37, s. 25 (2).

### **DIRECTION TO REPLACE CORONER**

(3) If the Chief Coroner is of the opinion that a coroner is unable to continue presiding over an inquest for any reason, the Chief Coroner may direct another coroner to continue the inquest. 1994, c. 27, s. 136 (3).

### **REQUEST BY RELATIVE FOR INQUEST**

**26.** (1) Where the coroner determines that an inquest is unnecessary, the spouse, parent, child, brother, sister or personal representative of the deceased person may request the coroner in writing to hold an inquest, and the coroner shall give the person requesting the inquest an opportunity to state his or her reasons, either personally, by the person's agent or in writing, and the coroner shall advise the person in writing within sixty days of the receipt of the request of the coroner's final decision and where the decision is to not hold an inquest shall deliver the reasons therefor in writing. R.S.O. 1990, c. C.37, s. 26 (1); 1999, c. 6, s. 15 (3); 2005, c. 5, s. 15 (4).

### **REVIEW OF REFUSAL**

(2) Where the final decision of a coroner under subsection (1) is to not hold an inquest, the person making the request may, within twenty days after the receipt of the decision of the coroner, request the Chief Coroner to review the decision and the Chief Coroner shall review the decision of the coroner after giving the person requesting the inquest an opportunity to state his or her reasons either personally, by the person's agent or in writing. R.S.O. 1990, c. C.37, s. 26 (2).

### **DECISION FINAL**

(3) The decision of the Chief Coroner is final. R.S.O. 1990, c. C.37, s. 26 (3); 2009, c. 15, s. 16.

### **WHERE CRIMINAL OFFENCE CHARGED**

**27.** (1) Where a person is charged with an offence under the *Criminal Code* (Canada) arising out of a death, an inquest touching the death shall be held only upon the direction of the Chief Coroner and, when held, the person charged is not a compellable witness. R.S.O. 1990, c. C.37, s. 27 (1); 2009, c. 15, s. 17 (1).

### **IDEM**

(2) Where during an inquest a person is charged with an offence under the *Criminal Code* (Canada) arising out of the death, the coroner shall discharge the jury and close the inquest, and shall then proceed as if he or she had determined that an inquest was unnecessary, but the Chief Coroner may direct that the inquest be reopened. R.S.O. 1990, c. C.37, s. 27 (2); 2009, c. 15, s. 17 (2).

### WHERE CHARGE OR APPEAL FINALLY DISPOSED OF

(3) Despite subsections (1) and (2), where a person is charged with an offence under the *Criminal Code* (Canada) arising out of the death and the charge or any appeal from a conviction or an acquittal of the offence charged has been finally disposed of or the time for taking an appeal has expired, the coroner may hold an inquest and the person charged is a compellable witness at the inquest. R.S.O. 1990, c. C.37, s. 27 (3); 2009, c. 15, s. 17 (3).

### POST MORTEM EXAMINATION

**28.** (1) A coroner may at any time during an investigation issue a warrant for a pathologist to perform a *post mortem* examination of the body. 2009, c. 15, s. 18.

### OTHER EXAMINATIONS AND ANALYSES

(2) A coroner may at any time during an investigation conduct examinations and analyses that the coroner considers appropriate in the circumstances or direct any person, other than the pathologist to whom the warrant is issued, to conduct such examinations and analyses. 2009, c. 15, s. 18.

### PATHOLOGIST'S DUTY

(3) The pathologist to whom the warrant is issued shall perform the *post mortem* examination of the body. 2009, c. 15, s. 18.

### POWER TO EXAMINE BODY

(4) The pathologist to whom the warrant is issued or, if no warrant has been issued, a pathologist who has been notified of the death by a coroner or police officer and who reasonably believes that a coroner's warrant will be issued to him or her under subsection (1) may,

- (a) enter and inspect any place where the dead body is and examine the body; and
- (b) enter and inspect any place from which the pathologist has reasonable grounds for believing the body was removed. 2009, c. 15, s. 18.

### NOTICE TO CORONER

(5) A pathologist who exercises a power under subsection (4) shall notify,

- (a) the coroner who issued the warrant; or
- (b) if no warrant has been issued, the coroner by whom the pathologist believes the warrant will be issued. 2009, c. 15, s. 18.

### OTHER EXAMINATIONS AND ANALYSES

(6) The pathologist who performs the *post mortem* examination may conduct or direct any person other than a coroner to conduct such other examinations and analyses as he or she considers appropriate in the circumstances. 2009, c. 15, s. 18.

### DIRECTION OF CHIEF FORENSIC PATHOLOGIST

(7) The Chief Forensic Pathologist may direct a pathologist or any other person, other than a coroner, to conduct any examinations and analyses that the Chief Forensic Pathologist considers appropriate in the circumstances. 2009, c. 15, s. 18.

## ASSISTANCE

(8) The pathologist who performs the *post mortem* examination may obtain the assistance of any person or persons in performing the *post mortem* examination and in conducting any other examinations and analyses. 2009, c. 15, s. 18.

## PATHOLOGIST FROM REGISTER

(9) The coroner may issue a warrant under subsection (1) only to a pathologist whose name is on the pathologists register. 2009, c. 15, s. 18.

## ASSIGNMENT TO ANOTHER PATHOLOGIST

(10) The Chief Forensic Pathologist may at any time during an investigation assign another pathologist whose name is on the pathologists register to perform the *post mortem* examination in place of the pathologist named on the coroner's warrant, and in that case, every reference in this section to the pathologist to whom the warrant is issued applies to the pathologist assigned to the investigation by the Chief Forensic Pathologist. 2009, c. 15, s. 18.

## REPORTS OF POST MORTEM FINDINGS

**29.** (1) The pathologist who performed the *post mortem* examination of a body under section 28 shall forthwith report in writing his or her findings from the *post mortem* examination and from any other examinations or analyses that he or she conducted to the coroner who issued the warrant, the regional coroner and, if the pathologist who performed the *post mortem* examination is not the Chief Forensic Pathologist, the Chief Forensic Pathologist. 2009, c. 15, s. 18.

## SAME

(2) A person, other than the pathologist who performed the *post mortem* examination, who conducted any other examination or analysis under section 28 shall forthwith report his or her findings in writing to the pathologist who performed the *post mortem* examination, the coroner who issued the warrant, the regional coroner and, if the pathologist who performed the *post mortem* examination is not the Chief Forensic Pathologist, the Chief Forensic Pathologist. 2009, c. 15, s. 18.

## FURTHER POST MORTEMS

(3) If, after a *post mortem* examination of a body is performed, the Chief Forensic Pathologist is of the opinion that a second or further *post mortem* examination of the body is necessary, he or she shall so advise the Chief Coroner, and the Chief Coroner shall issue a warrant for a second or further *post mortem* examination of the body. 2009, c. 15, s. 18.

## CROWN COUNSEL

**30.** (1) Every coroner before holding an inquest shall notify the Crown Attorney of the time and place at which it is to be held and the Crown Attorney or a barrister and solicitor or any other person designated by him or her shall attend the inquest and shall act as counsel to the coroner at the inquest. R.S.O. 1990, c. C.37, s. 30 (1).

## COUNSEL FOR MINISTER

(2) The Minister may be represented at an inquest by counsel and shall be deemed to be a person with standing at the inquest for the purpose. R.S.O. 1990, c. C.37, s. 30 (2).

## PURPOSES OF INQUEST

**31.** (1) Where an inquest is held, it shall inquire into the circumstances of the death and determine,

- (a) who the deceased was;
- (b) how the deceased came to his or her death;
- (c) when the deceased came to his or her death;
- (d) where the deceased came to his or her death; and
- (e) by what means the deceased came to his or her death. R.S.O. 1990, c. C.37, s. 31 (1).

## IDEM

(2) The jury shall not make any finding of legal responsibility or express any conclusion of law on any matter referred to in subsection (1). R.S.O. 1990, c. C.37, s. 31 (2).

## AUTHORITY OF JURY TO MAKE RECOMMENDATIONS

(3) Subject to subsection (2), the jury may make recommendations directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest. R.S.O. 1990, c. C.37, s. 31 (3).

## IMPROPER FINDING

(4) A finding that contravenes subsection (2) is improper and shall not be received. R.S.O. 1990, c. C.37, s. 31 (4).

## FAILURE TO MAKE PROPER FINDING

(5) Where a jury fails to deliver a proper finding it shall be discharged. R.S.O. 1990, c. C.37, s. 31 (5).

## INQUEST PUBLIC

**32.** An inquest shall be open to the public except where the coroner is of the opinion that national security might be endangered or where a person is charged with an indictable offence under the *Criminal Code* (Canada) in which cases the coroner may hold the hearing concerning any such matters in the absence of the public. R.S.O. 1990, c. C.37, s. 32.

## JURIES

**33.** (1) Every inquest shall be held with a jury composed of five persons. R.S.O. 1990, c. C.37, s. 33 (1); 2009, c. 15, s. 19 (1).

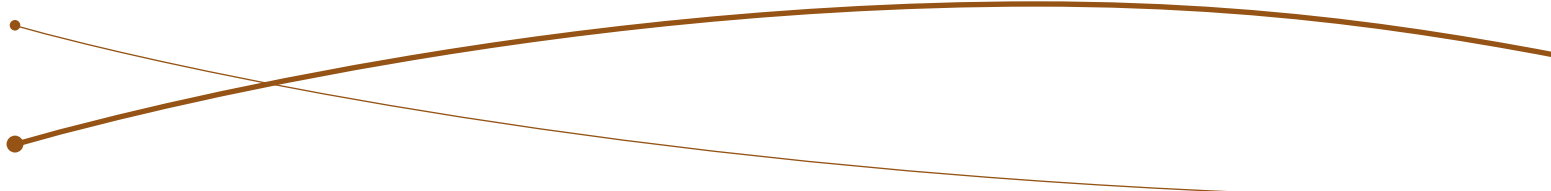
## JURORS

(2) The coroner shall direct a constable to select from the list of names of persons provided under subsection 34 (2) five persons who in his or her opinion are suitable to serve as jurors at an inquest and the constable shall summon them to attend the inquest at the time and place appointed. R.S.O. 1990, c. C.37, s. 33 (2).

## IDEM

(3) Where fewer than five of the jurors so summoned attend at the inquest, the coroner may name and appoint so many persons then present or who can be found as will make up a jury of five. R.S.O. 1990, c. C.37, s. 33 (3).

(4) Repealed: 2009, c. 15, s. 19 (2).



## LIST OF JURORS

**34.** (1) A coroner may by his or her warrant require the sheriff for the area in which an inquest is to be held to provide a list of the names of such number of persons as the coroner specifies in the warrant taken from the jury roll prepared under the *Juries Act*. R.S.O. 1990, c. C.37, s. 34 (1).

## IDEM

(2) Upon receipt of the warrant, the sheriff shall provide the list containing names of persons in the number specified by the coroner, taken from the jury roll prepared under the *Juries Act*, together with their ages, places of residence and occupations. R.S.O. 1990, c. C.37, s. 34 (2).

## ELIGIBILITY

(3) No person who is ineligible to serve as a juror under the *Juries Act* shall be summoned to serve or shall serve as a juror at an inquest. R.S.O. 1990, c. C.37, s. 34 (3).

## IDEM

(4) An officer, employee or inmate of a hospital or an institution referred to in subsection 10 (2) or (3) shall not serve as a juror at an inquest upon the death of a person who died therein. R.S.O. 1990, c. C.37, s. 34 (4).

## EXCUSING FROM SERVICE

(5) The coroner may excuse any person on the list from being summoned or from serving as a juror on the grounds of illness or hardship. R.S.O. 1990, c. C.37, s. 34 (5).

## EXCLUSION OF JUROR WITH INTEREST

(6) The coroner presiding at an inquest may exclude a person from being sworn as a juror where the coroner believes there is a likelihood that the person, because of interest or bias, would be unable to render a verdict in accordance with the evidence. R.S.O. 1990, c. C.37, s. 34 (6).

## EXCUSING OF JUROR FOR ILLNESS

(7) Where in the course of an inquest the coroner is satisfied that a juror should not, because of illness or other reasonable cause, continue to act, the coroner may discharge the juror. R.S.O. 1990, c. C.37, s. 34 (7).

## CONTINUATION WITH REDUCED JURY

(8) Where in the course of an inquest a member of the jury dies or becomes incapacitated from any cause or is excluded or discharged by the coroner under subsection (6) or (7) or is found to be ineligible to serve, the jury shall, unless the coroner otherwise directs and if the number of jurors is not reduced below three, be deemed to remain properly constituted for all purposes of the inquest. R.S.O. 1990, c. C.37, s. 34 (8).

## REPORT TO SHERIFF RE JURY SERVICE

**35.** On or before the 31st day of December in each year, the coroner shall advise the sheriff of the names of persons who have received fees for service as jurors at inquests and the number of each such name on the jury roll. R.S.O. 1990, c. C.37, s. 35.

## JURY IRREGULARITIES NOT TO AFFECT OUTCOME

**36.** The omission to observe any of the provisions of this Act or the regulations respecting the eligibility and selection of jurors is not a ground for impeaching or quashing a verdict. R.S.O. 1990, c. C.37, s. 36.

## **JURY'S DUTIES, POWERS**

### **VIEW OF PLACE**

**37.** (1) The jury shall view any place that the coroner directs them to view. 2009, c. 15, s. 20.

### **QUESTIONS**

(2) The jurors are entitled to ask relevant questions of each witness. R.S.O. 1990, c. C.37, s. 37 (2).

### **MAJORITY VERDICT**

**38.** A verdict or finding may be returned by a majority of the jurors sworn. R.S.O. 1990, c. C.37, s. 38.

### **SERVICE OF SUMMONSES**

**39.** A summons to a juror or to a witness may be served,

- (a) by personal service;
- (b) by leaving a copy, in a sealed envelope addressed to the person summoned, at his or her place of residence with anyone who appears to be an adult member of the same household; or
- (c) by sending it by registered mail addressed to the place of residence of the person summoned. 2009, c. 15, s. 21.

### **SUMMONSES**

**40.** (1) A coroner may require any person by summons,

- (a) to give evidence on oath or affirmation at an inquest; and
- (b) to produce in evidence at an inquest documents and things specified by the coroner,

relevant to the subject-matter of the inquest and admissible. R.S.O. 1990, c. C.37, s. 40 (1).

### **FORM AND SERVICE OF SUMMONSES**

(2) A summons issued under subsection (1) shall be in the form approved by the Minister and shall be signed by the coroner. 2009, c. 15, s. 22.

### **BENCH WARRANTS**

(3) Upon proof to the satisfaction of a judge of the Superior Court of Justice of the service of a summons under this section upon a person and that,

- (a) such person has failed to attend or to remain in attendance at an inquest in accordance with the requirements of the summons; and
- (b) the person's presence is material to the inquest,

the judge may, by a warrant in the prescribed form, directed to any police officer, cause such witness to be apprehended anywhere within Ontario and forthwith to be brought to the inquest and to be detained in custody as the judge may order until the person's presence as a witness at the inquest is no longer required, or, in the discretion of the judge, to be released on a recognizance (with or without sureties) conditioned for appearance to give evidence. R.S.O. 1990, c. C.37, s. 40 (3); 1997, c. 39, s. 4 (2); 2006, c. 19, Sched. C, s. 1 (1); 2009, c. 33, Sched. 9, s. 3 (1).





## **PROOF OF SERVICE**

(4) Service of a summons may be proved by affidavit in an application under subsection (3). R.S.O. 1990, c. C.37, s. 40 (4).

## **CERTIFICATE OF FACTS**

(5) Where an application under subsection (3) is made on behalf of a coroner, the coroner may certify to the judge the facts relied on to establish that the presence of the person summoned is material for the purposes of the inquest and such certificate may be accepted by the judge as proof of such facts. R.S.O. 1990, c. C.37, s. 40 (5).

## **PERSONS WITH STANDING AT INQUEST**

**41.** (1) On the application of any person before or during an inquest, the coroner shall designate the person as a person with standing at the inquest if the coroner finds that the person is substantially and directly interested in the inquest. R.S.O. 1990, c. C.37, s. 41 (1); 1993, c. 27, Sched.; 1999, c. 12, Sched. P, s. 2.

## **RIGHTS OF PERSONS WITH STANDING AT INQUEST**

(2) A person designated as a person with standing at an inquest may,

- (a) be represented by a person authorized under the *Law Society Act* to represent the person with standing;
- (b) call and examine witnesses and present arguments and submissions;
- (c) conduct cross-examinations of witnesses at the inquest relevant to the interest of the person with standing and admissible. R.S.O. 1990, c. C.37, s. 41 (2); 2006, c. 21, Sched. C, s. 104 (1).

## **COSTS OF REPRESENTATION**

(3) If the coroner in an inquest into the death of a victim as defined in the *Victims' Bill of Rights*, 1995 designates a spouse, same-sex partner or parent of the victim as a person with standing at the inquest, the person may apply to the Minister to have the costs that the person incurs for representation by legal counsel in connection with the inquest paid out of the victims' justice fund account continued under subsection 5 (1) of the *Victims' Bill of Rights*, 1995. 2006, c. 24, s. 2 (2).

## **PAYMENT**

(4) Subject to the approval of Management Board of Cabinet, payment of the costs described in subsection (3) may be made out of the victims' justice fund account. 2006, c. 24, s. 2 (2).

## **PROTECTION FOR WITNESSES**

**42.** (1) A witness at an inquest shall be deemed to have objected to answer any question asked the witness upon the ground that his or her answer may tend to criminate the witness or may tend to establish his or her liability to civil proceedings at the instance of the Crown, or of any person, and no answer given by a witness at an inquest shall be used or be receivable in evidence against the witness in any trial or other proceedings against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence. R.S.O. 1990, c. C.37, s. 42 (1).

## **RIGHT TO OBJECT UNDER CANADA EVIDENCE ACT**

(2) Where it appears at any stage of the inquest that the evidence that a witness is about to give would tend to criminate the witness, it is the duty of the coroner and of the Crown Attorney to ensure that the witness is informed of his or her rights under section 5 of the *Canada Evidence Act*. R.S.O. 1990, c. C.37, s. 42 (2).

## **RIGHTS OF WITNESSES TO REPRESENTATION**

**43.** (1) A witness at an inquest is entitled to be advised as to his or her rights by a person authorized under the *Law Society Act* to advise him or her, but such person may take no other part in the inquest without leave of the coroner. 2006, c. 21, Sched. C, s. 104 (2).

## **SAME**

(2) Where an inquest is held in the absence of the public, a person advising a witness under subsection (1) is not entitled to be present except when that witness is giving evidence. 2006, c. 21, Sched. C, s. 104 (2).

## **ADMISSIBILITY OF EVIDENCE**

### **WHAT IS ADMISSIBLE IN EVIDENCE AT INQUEST**

**44.** (1) Subject to subsections (2) and (3), a coroner may admit as evidence at an inquest, whether or not admissible as evidence in a court,

- (a) any oral testimony; and
- (b) any document or other thing,

relevant to the purposes of the inquest and may act on such evidence, but the coroner may exclude anything unduly repetitious or anything that the coroner considers does not meet such standards of proof as are commonly relied on by reasonably prudent persons in the conduct of their own affairs and the coroner may comment on the weight that ought to be given to any particular evidence. R.S.O. 1990, c. C.37, s. 44 (1).

### **WHAT IS INADMISSIBLE IN EVIDENCE AT INQUEST**

(2) Nothing is admissible in evidence at an inquest,

- (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
- (b) that is inadmissible by the statute under which the proceedings arise or any other statute. R.S.O. 1990, c. C.37, s. 44 (2).

## **CONFLICTS**

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence. R.S.O. 1990, c. C.37, s. 44 (3).

## **COPIES**

(4) Where the coroner is satisfied as to their authenticity, a copy of a document or other thing may be admitted as evidence at an inquest. R.S.O. 1990, c. C.37, s. 44 (4).

## **PHOTOCOPIES**

(5) Where a document has been filed in evidence at an inquest, the coroner may, or the person producing it or entitled to it may with the leave of the coroner, cause the document to be photocopied and the coroner may authorize the photocopy to be filed in evidence in the place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by the coroner. R.S.O. 1990, c. C.37, s. 44 (5).

## **TAKING EVIDENCE**

**45.** (1) The evidence upon an inquest or any part of it shall be recorded by a person appointed by the coroner and approved by the Crown Attorney and who before acting shall make oath or affirmation that he or she will truly and faithfully record the evidence. R.S.O. 1990, c. C.37, s. 45 (1).

## **TRANSCRIPTION OF EVIDENCE**

(2) It is not necessary to transcribe the evidence unless the Chief Coroner or Crown Attorney orders it to be done or unless any other person requests a copy of the transcript and pays the fees therefor except that the coroner may prohibit the transcribing of all or any part of evidence taken in the absence of the public. R.S.O. 1990, c. C.37, s. 45 (2); 2009, c. 15, s. 23.

## **ADJOURNMENTS**

**46.** An inquest may be adjourned from time to time by the coroner of his or her own motion or where it is shown to the satisfaction of the coroner that the adjournment is required to permit an adequate hearing to be held. R.S.O. 1990, c. C.37, s. 46.

## **MAINTENANCE OF ORDER AT INQUEST**

**47.** A coroner may make such orders or give such directions at an inquest as he or she considers necessary for the maintenance of order at the inquest, and, if any person disobeys or fails to comply with any such order or direction, the coroner may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose. R.S.O. 1990, c. C.37, s. 47.

## **INTERPRETERS AND CONSTABLES**

### **INTERPRETERS**

**48.** (1) A coroner may, and if required by the Crown Attorney or requested by the witness shall, employ a person to act as interpreter for a witness at an inquest, and such person may be summoned to attend the inquest and before acting shall make oath or affirm that he or she will truly and faithfully translate the evidence. R.S.O. 1990, c. C.37, s. 48 (1).

### **CONSTABLES**

(2) A coroner may appoint such persons as constables as the coroner considers necessary for the purpose of assisting the coroner in an inquest and, on the request of the coroner, the police force having jurisdiction in the locality in which an inquest is held shall provide a police officer for the purpose and, before acting, every such constable shall take oath or affirm that he or she will faithfully perform his or her duties. R.S.O. 1990, c. C.37, s. 48 (2).

## **ADMINISTRATION OF OATHS**

**49.** The coroner conducting an inquest has power to administer oaths and affirmations for the purpose of the inquest. R.S.O. 1990, c. C.37, s. 49.

## **FURTHER POWERS OF CORONER**

### **ABUSE OF PROCESSES**

**50.** (1) A coroner may make such orders or give such directions at an inquest as the coroner considers proper to prevent abuse of its processes. R.S.O. 1990, c. C.37, s. 50 (1).

### **LIMITATION ON CROSS-EXAMINATION**

(2) A coroner may reasonably limit further cross-examination of a witness where the coroner is satisfied that the cross-examination of the witness has been sufficient to disclose fully and fairly the facts in relation to which the witness has given evidence or where the coroner is of the opinion that the questions being asked are irrelevant, unduly repetitious or abusive. 2009, c. 15, s. 24.

### **EXCLUSION OF REPRESENTATIVES**

(3) A coroner may exclude from a hearing anyone, other than a person licensed under the *Law Society Act*, advising a witness if the coroner finds that such person is not competent properly to advise the witness, or does not understand and comply at the inquest with the duties and responsibilities of an adviser. 2006, c. 21, Sched. C, s. 104 (3).

### **RULES OF PROCEDURE FOR INQUESTS**

**50.1** The Chief Coroner may make additional rules of procedure for inquests. 2009, c. 15, s. 25.

### **CONTEMPT PROCEEDINGS**

**51.** Where any person without lawful excuse,

- (a) on being duly summoned as a witness or a juror at an inquest makes default in attending at the inquest; or
- (b) being in attendance as a witness at an inquest, refuses to take an oath or to make an affirmation legally required by the coroner to be taken or made, or to produce any document or thing in his or her power or control legally required by the coroner to be produced by the person or to answer any question to which the coroner may legally require an answer; or
- (c) does any other thing that would, if the inquest had been a court of law having power to commit for contempt, have been contempt of that court,

the coroner may state a case to the Divisional Court setting out the facts and that court may, on application on behalf of and in the name of the coroner, inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court. R.S.O. 1990, c. C.37, s. 51.

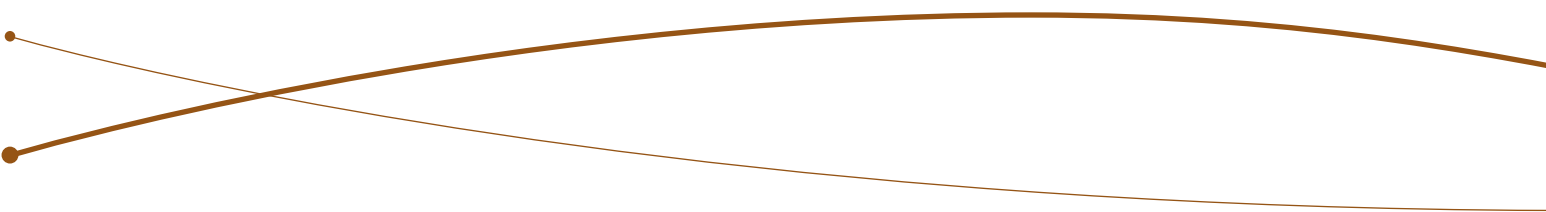
### **CONCLUSION OF INQUEST**

#### **RETURN OF VERDICT**

**52.** (1) The coroner shall forthwith after an inquest return the verdict or finding, with the evidence where the Crown Attorney or Chief Coroner has ordered it to be transcribed, to the Chief Coroner, and shall transmit a copy of the verdict and recommendations to the Crown Attorney. R.S.O. 1990, c. C.37, s. 52 (1); 2009, c. 15, s. 26.

#### **RELEASE OF EXHIBITS**

(2) After an inquest is concluded, the coroner shall, upon request, release documents and things put in evidence at the inquest to the lawful owner or person entitled to possession thereof. R.S.O. 1990, c. C.37, s. 52 (2).



## **PROTECTION FROM PERSONAL LIABILITY**

**53.** No action or other proceeding shall be instituted against any person exercising a power or performing a duty under this Act for any act done in good faith in the execution or intended execution of any such power or duty or for any alleged neglect or default in the execution in good faith of any such power or duty. 2009, c. 15, s. 27.

## **SEALS NOT NECESSARY**

**54.** In proceedings under this Act, it is not necessary for a person to affix a seal to a document, and no document is invalidated by reason of the lack of a seal, even though the document purports to be sealed. R.S.O. 1990, c. C.37, s. 54.

## **OFFENCES**

**55.** Any person who contravenes section 10, 11, 13 or subsection 16 (6) is guilty of an offence and on conviction is liable to a fine of not more than \$1,000 or to imprisonment for a term of not more than six months, or to both. R.S.O. 1990, c. C.37, s. 55.

## **REGULATIONS AND FEES**

**56.** (1) The Lieutenant Governor in Council may make regulations,

- (a) prescribing powers and duties of the Chief Coroner;
- (b) prescribing powers and duties of the Chief Forensic Pathologist;
- (c) prescribing the composition of the Oversight Council and of the complaints committee of the Oversight Council;
- (d) prescribing matters for the purpose of paragraph 7 of subsection 8.1 (1);
- (e) respecting the making, referral and reviewing of complaints under section 8.4;
- (f) defining “restrain” for the purpose of subsections 10 (4.7) and (4.8);
- (g) governing the retention, storage and disposal of tissue samples, implanted devices and body fluids obtained in performing a post mortem examination of a body or conducting examinations or analyses under section 28. 2009, c. 15, s. 28 (1); 2009, c. 33, Sched. 9, s. 3 (2).

## **SAME**

(2) The Minister may make regulations,

- (a) respecting the appointment of persons under section 16.1;
- (b) prescribing limits on the powers of persons appointed under section 16.1;
- (c) providing for the selecting, recording, summoning, attendance and service of persons as jurors at inquests;
- (d) prescribing matters that may be grounds for disqualification because of interest or bias of jurors for the purposes of subsection 34 (6);
- (e) prescribing the contents of oaths and affirmations required or authorized by this Act;
- (f) prescribing the form of a warrant for the purpose of subsection 40 (3);

- (g) prescribing fees and allowances that shall be paid to persons rendering services in connection with coroners' investigations and inquests and providing for the adjustment of such fees and allowances in special circumstances;
- (h) requiring and governing the disclosure, collection and use of information, including personal information within the meaning of the *Freedom of Information and Protection of Privacy Act*, about coroners, pathologists and other members of the College of Physicians and Surgeons of Ontario among the Chief Coroner, the Chief Forensic Pathologist, the Oversight Council and the College of Physicians and Surgeons of Ontario. 2009, c. 15, s. 28 (1).

### **CORONERS' FEES AND ALLOWANCES**

(3) The Minister may set fees and allowances for coroners for services performed under this or any other Act and may provide for the adjustment of such fees and allowances in special circumstances. 1997, c. 39, s. 5 (2).

### **NON-APPLICATION OF *LEGISLATION ACT, 2006*, PART III**

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to,

- (a) any rules made by the Chief Forensic Pathologist respecting the maintenance of the register of pathologists under section 7.1 or the authorization of pathologists to provide services under this Act; or
- (b) the rules of procedure for inquests made by the Chief Coroner under section 50.1. 2009, c. 15, s. 28 (2).

### **FORMS**

**57.** (1) The Minister may approve forms for the purposes of this Act and provide for their use. 2009, c. 15, s. 29.

### **SAME**

(2) Where the Minister approves a form and requires its use, the form shall be available on the website of the ministry of the Minister. 2009, c. 15, s. 29.





# APPENDIX D





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Frank Iacobucci  
Tel 416.865.8217

November 9, 2011

**RE: Independent Review of First Nations Representation on Ontario's Jury Roll**

I would like to take this opportunity to introduce myself as the Independent Reviewer appointed by the Attorney General and the Government of Ontario to examine, report and offer recommendations regarding the process for inclusion of First Nation peoples living in reserve communities on the provincial jury roll from which potential jurors are selected for all jury trials and coroners inquests. My report will be submitted to the Attorney General of Ontario on or before August 31, 2012.

The matter of First Nations' representation on Ontario's jury roll has been raised in certain trials and coroners' inquests over the last several years, a development that has prompted some First Nations' organizations to advocate for a systemic review of the creation of the jury roll. The Government of Ontario has responded by establishing a process for an Independent Review with the objective of enhancing First Nations' representation on the provincial jury roll and strengthening the relationship between the Ministry of the Attorney General and First Nations in this regard.

I am keen to meet with First Nation organizations and communities in the next few months to discuss this important matter and obtain an informed view of the issues related to First Nations and the jury roll. I hope you will be interested in participating in this process. I welcome your involvement, or the involvement of your member communities, and look forward to discussing the most effective means by which this could occur, considering the needs of your organization and the parameters of this process. We would be pleased to receive written submissions, convene or attend meetings, or engage in a combination of these approaches.

Throughout the Independent Review process, I will be supported by a legal team led by John Terry, a partner at Torys LLP and Candice S. Metallic, of Maurice Law Barristers & Solicitors as Associate Counsel. Please feel encouraged to follow up with either Mr. Terry or Ms. Metallic if you wish to participate in this process, or if you have any questions, comments or concerns respecting the process.

For further information, please visit the website for the Independent Review at [www.firstnationsandjuriesreview.ca](http://www.firstnationsandjuriesreview.ca). I look forward to meeting with you in the very near future.

Sincerely,

A handwritten signature in dark ink, reading "Frank Iacobucci".

Frank Iacobucci

# APPENDIX E

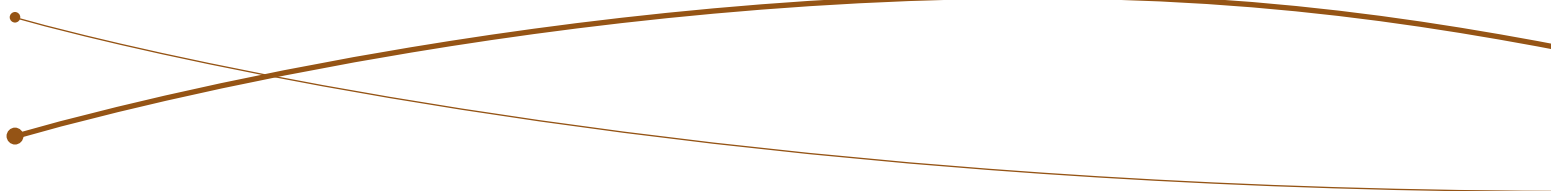




## LIST OF ENGAGEMENT SESSIONS

FIRST NATIONS AND OTHER GROUPS AND INDIVIDUALS	OFFICIALS THAT ATTENDED	SUBMISSIONS
<i>Nishnawbe Aski Nation</i>	Several meetings with, then, Deputy Chief Terry Waboose, Bentley Cheechoo and NAN Assembly	Written Submission
1. Keewaywin	Council, Elders & community representatives	
2. Kassabonika Lake	Chief & Council, Elders, community representatives, and justice committee	Written Submission
3. Webequie	Council, community representatives	
4. Mattagami	Chief & Council, community representatives	
5. Moose Cree	Chief & Council, justice worker, probation officer, lawyer	Written Submission
6. Constance Lake	Chief & Council, community representatives	
7. Sandy Lake	Chief & Council, Elders, justice committee	
8. Mushkeegomang	Chief & Council	
9. Poplar Hill	Chief & Council	
10. Sachigo Lake	Chief & Council, community representatives, students	Written Submission
11. Kasheshewan	Chief Solomon (in Toronto)	
<i>Grand Council Treaty 3</i>	Meeting with then Grand Chief Diane Kelly and Chief Simon Forbister	
1. Wauzhushk Onigum	Gathering of 8 Chiefs, Councilors, Elders, and technicians	

<i>Union of Ontario Indians</i>	Meeting with legal counsel	Written Submission
1. Garden River	Gathering of 3 Chiefs, an Elder and technicians	Written presentation
2. Toronto	Gathering of 1 Chief, Councilors from 5 First Nations, and technicians	3 written presentations
<i>Independents</i>		
Akwesasne	Chief & Council, Justice Department	
Chippewas of Saugeen	Chief & Council	
Six Nations	Chief & Council	
Pikwagnagan	Chief & Council	
<i>Organizations</i>		
Aboriginal Legal Services Toronto	a. Several meetings with Director of Legal Services b. Families Forum of those involved in Coroner's Inquests	Written Submission
Provincial Advocate for Children and Youth	Meeting with Provincial Advocate, legal counsel and staff	Written Submission
<i>Government</i>		
Ministry of Attorney General	Meeting with legal counsel and other officials	
Court Services Division	Meeting with Director of Court Services, Northwest Region Meeting with Court Services officials, Kenora Meeting with Assistant Crown Counsel (retired)	
Provincial Jury Centre	Teleconference with officials	
<i>Judiciary</i>		
Judges	Meetings with judges from the Ontario Superior Court of Justice and Ontario Court of Justice	







# APPENDIX F





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April 20, 2012

**RE: Independent Review of First Nations Representation on Ontario's Jury Roll -  
Points Raised Through Dialogue with First Nations and Further Questions**

Last November, I wrote to you to introduce myself as the Independent Reviewer appointed by the Attorney General and the Government of Ontario to examine, report and offer recommendations regarding the process for inclusion of First Nation peoples living in reserve communities on the provincial jury roll from which potential jurors are selected for all jury trials and coroners inquests.

I explained at the time that I would be meeting with First Nation organizations and communities over the next several months to obtain an informed view of the issues related to First Nations and the jury roll. I have now completed most of those consultations, having traveled throughout the province to meet with First Nations leaders and community members, treaty organization representatives, judges, court officials and other interested groups to discuss this very serious issue.

As we move from the consultation phase toward the report-writing stage of my review, I wanted to give you feedback on what I have heard during these consultations and provide you with an additional opportunity to give your input on some follow-up questions that I have. In order to do that, I enclose a short document that describes the points raised through my dialogue with First Nations, organized under five issues, as well as a list of follow-up questions relating to some of those issues.

I encourage you to provide me with your comments or submissions in response to these questions, any of the other issues discussed and points raised in the document, or any other issues relevant to my review. In order to meet the deadline for me to complete my report, I would be grateful if you would provide me with any comments or submissions by no later than May 25, 2012.

Sincerely,

A handwritten signature in black ink that reads "Frank Iacobucci".

Frank Iacobucci

# INDEPENDENT REVIEW OF FIRST NATION REPRESENTATION ON ONTARIO'S JURY ROLL

## MANDATE OF INDEPENDENT REVIEW

- I. Systemic challenges to First Nations representation on Ontario's jury roll for trials and coroner's inquests
- II. Improve relationship between First Nations and Ministry of the Attorney General in the context of the jury roll

## POINTS RAISED THROUGH DIALOGUE WITH FIRST NATIONS

### ISSUE #1: FIRST NATIONS' PERSPECTIVES ON THE JUSTICE SYSTEM CHILL THE DESIRE TO SERVE ON ONTARIO JURIES

- a) Competing values, ideologies and laws with respect to achieving justice, i.e. Canadian system of criminal justice does not accord with traditional First Nations principles of attaining harmony and balance
- b) Systemic discrimination – negative experiences have shaped adverse perspectives and mistrust of the whole of the criminal justice system, including jury duty
- c) Justice challenges in northern First Nations communities are distinct -- e.g. lack of access -- and compound the problem
- d) Lack of education about and awareness of the jury system
- e) Self-government objectives for community based justice initiatives and ancillary resource/capacity requirements are not supported
- f) Inadequate policing services and funding contribute to negative perceptions of the criminal justice system

### ISSUE #2: CURRENT PRACTICES FOR COLLECTION OF NAMES AND CONTACT INFORMATION OF FIRST NATIONS PEOPLES ON RESERVE ARE INADEQUATE

- a) Residency vs. membership – A specific list of on-reserve residence is required, rather than the full membership list or voters list
- b) First Nations seek capacity to gather and maintain appropriate, accurate and current records, including addresses, for jury roll purposes
- c) Voluntariness of First Nation participation is required given extent of existing social and economic pressures. First Nations' administrators are best positioned to solicit interest

### ISSUE #3: JUROR QUESTIONNAIRES POSE PROBLEMS AND CONCERNS THAT DETER FIRST NATION RESPONSES

- a) Penalty for non-response (fine or imprisonment) within unreasonable time limit (five days of receipt of notice) is perceived as imposing jury duty through intimidation and threat
- b) The requirement to declare 'Canadian' citizenship prevents participation of many First Nations peoples
- c) List of exemptions from jury duty ought to include elected First Nation leadership



- d) English or French-speaking requirement is problematic for many whose primary language is their First Nation language – juries ought to be equipped with translation services, if necessary
- e) Lack of translation of questionnaires and instructions pose challenges to completing forms
- f) Lack of understanding of the jury selection process and role of juries prevent response to jury questionnaires
- g) Confusion and misunderstanding may arise when someone is empanelled but not chosen for a jury

#### **ISSUE #4: PRACTICAL BARRIERS TO JURY PARTICIPATION**

- a) Transportation – travel to urban centers often requires multiple modes of transportation that occupy significant amounts of time (several days in some circumstances) and costs are beyond what people can afford out of pocket. Transportation presents a significant barrier to northern First Nations who incur higher travel costs which, in turn, further inhibits participation
- b) Accommodations and meal allowances are not always sufficient
- c) Childcare expenses must be included as a necessary expense
- d) Employment income supplements may be required, when necessary
- e) All expenses related to the jury system must be paid prior to travel due to lack of resources and credit
- f) Community-based supports, such as assistance with process and postjury service psychological effects, are needed by those who participate in juries
- g) Lack of translation services while in urban centres creates hardships
- h) Criminal records and lack of awareness of pardon procedures present a bar to service

#### **ISSUE #5: RELATIONSHIP BETWEEN THE MINISTRY OF THE ATTORNEY GENERAL AND FIRST NATIONS WITH RESPECT TO THE JURY ROLL NEEDS TO BE IMPROVED**

- a) Need for collaboration between the Ministry of the Attorney General and First Nations
- b) Education and awareness of jury system for both trials and coroner's inquests among First Nations needs to be improved
- c) Increased education required for provincial officials regarding First Nations' culture, values and traditions
- d) More education about process for pardons and access to support services for First Nations is required
- e) Proper funding is required to support community based justice initiatives aimed at enhancing participation on juries in a culturally appropriate manner and to implement First Nation restorative justice initiatives
- f) Better cultural sensitivity training is needed for those involved in the justice system

## **FOLLOW-UP QUESTIONS**

### **1. ON-RESERVE RESIDENCY NAME AND ADDRESS INFORMATION**

- a) How should this information be collected?
- b) Should OHIP information be used?
- c) Should band list information be provided?
- d) Should First Nations communities collect this information themselves and provide it to the Ministry of the Attorney General?

### **2. JURY FORMS**

- a) Should the forms ask whether an individual is “First Nations” as opposed to the current form which asks whether an individual is a Canadian citizen?
- b) How can First Nations members be encouraged to complete and submit the forms? For example, should the penalties for non-response be modified in some way?
- c) Are there any exemptions from jury service that should be included in addition to exempted First Nations leadership?
- d) If the form stated that a translator could be provided for a juror, would that improve First Nations participation?

### **3. PRACTICAL BARRIERS**

- a) What kinds of transportation, accommodation, meals or other costs should be paid for in order to encourage participation?
- b) What kinds of community supports for completing jury forms, attending a trial or inquest, or dealing with post-jury psychological effects should be provided?

### **4. RELATIONSHIP BETWEEN FIRST NATIONS AND MINISTRY OF THE ATTORNEY GENERAL**

- a) What steps would you recommend be taken to improve this relationship?





